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Supreme Court of the United States

OCTOBER TERM, 1940

Nos. 381 and 382

Z. & F. ASSETS REALIZATION CORPORATION, a Delaware corporation; AMERICAN-HAWAIIAN STEAMSHIP COMPANY, Intervener,

Petitioners,

v.

CORDELL HULL, Secretary of State, and HENRY MORGENTHAU, Secretary of the Treasury; LEHIGH VALLEY RAILROAD COMPANY, Intervener,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR INTERVENER-RESPONDENT LEHIGH VALLEY RAILROAD COMPANY

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BRIEF FOR INTERVENER-RESPONDENT

OPINIONS BELOW

The opinion of the District Court (R. 295) is reported in 31 F. Supp. 371. The opinion of the Court of Appeals (R. 335) is reported in 114 F. (2d) 464.

JURISDICTION.

The judgment of the United States Court of Appeals for the District of Columbia was entered June 3, 1940 (R. 354). The petition for *certiorari* was filed August 29, 1940, and granted October 14, 1940. The jurisdiction of this Court rests on Sec. 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The petitioners are the beneficiaries of awards made to the United States on their behalf by the Mixed Claims Commission, United States and Germany, on which have been paid sums in excess of the principal amounts of the awards (R. 42, 75, 111).[1] They brought this suit to restrain the Secretary of State from certifying to the Secretary of the Treasury, and to restrain the latter from paying, 153 later awards made by the Commission to the United States, on behalf of Lehigh Valley Railroad Company and others, for damages resulting from the destruction by German agents of property at Black Tom Island in New York Harbor in July, 1916, and at Kingsland, New Jersey, in January, 1917. The payment of these sabotage awards would reduce the funds otherwise in part available for payment on account of the balances due petitioners.

Petitioners contend that the sabotage awards are invalid and ask that they be held void.

Petitioners' statement of the questions presented (Brief No. 381, pp. 2, 3; Brief No. 382, pp. 7-10) does not, we believe, accurately set forth the principal questions actually presented, nor does it adequately differentiate, from the standpoint of relative significance, between the several contentions which they advance.

The specific questions involved are, therefore, summarized below.

QUESTIONS DECIDED BY THE COMMISSION

1. Power of the Commission to reopen the cases

In 1930 the Commission rendered a decision that the United States had failed to prove its case against Germany,

and dismissed the claims. Thereafter, the United States filed a petition to set aside that decision on the ground that it had been obtained by fraud. The Commission (with its membership then full) held in 1933 that it had power to reopen the cases. In 1939, after continuous litigation since 1933 and the production by both Governments of masses of further evidence, the Commission set aside the 1930 decision, held Germany responsible for the Black Tom and Kingsland destructions, and entered awards on the sabotage claims.

Germany had contended before the Commission in 1933 that, even if the first decision had been obtained by fraud, the Commission, though still functioning, was without power to reopen the cases, and was helpless to act.

The petitioners take the same position and claim that the awards are, therefore, void, and ask this Court to overturn the decision of the Commission.

2. Power of the Umpire and the American Commissioner to function after the withdrawal of the German Commissioner

The Commission consisted of two National Commissioners and an Umpire. Unanimity was not required. The concurrence of two was sufficient for a decision.

After argument and submission to the Commission in January, 1939, its three members went into conferences (continuing intermittently until March 1st), during which they considered whether the decision of 1930, in favor of Germany, had been induced by a fraudulent and corrupt defense, and, if so, whether on the entire record there was sufficient proof of Germany's responsibility for the destructions to justify setting aside the 1930 decision. On

March 1st the German Commissioner, aware that the two other members intended to sustain the charge of fraud and reopen the case, and that they were convinced that Germany was responsible for the destructions, retired for the purpose of preventing a decision.

The question arises whether that attempt of Germany to frustrate the arbitration was effective to prevent the Umpire and American Commissioner from proceeding to dispose finally of the cases. Germany argued that it was effective.

The two remaining members of the Commission considered this question and held they had the power, and exercised it.

The withdrawal of the German Commissioner also gave rise to certain procedural questions, subordinate to the principal question of the power of the Commission to act at all. These questions are also raised here by petitioners.

3. Nationality of Agency of Canadian Car & Foundry Company

One of the sabotage awards entered on October 30, 1939, was in favor of the United States on behalf of Agency of Canadian Car & Foundry Company, Ltd., a New York corporation, for the destruction of its plant and other property at Kingsland, New Jersey, by German agents. Germany contended before the Commission that foreign ownership of stock of the New York corporation deprived it of its status as an American national. This question, up for decision by the Commission before the German Commissioner withdrew, was decided against Ger-

many after he withdrew. The question was one of mixed fact and law involving an interpretation of the agreement between the two governments establishing the Commission.

One of the petitioners adopts the German contention and asks this Court to overturn that decision of the Commission.

QUESTIONS ARISING SINCE THE SABOTAGE AWARDS WERE MADE, AND THEREFORE NOT DECIDED BY THE COMMISSION

Power of the domestic courts to inquire into the validity of the awards

This question has two aspects.

First—Political matters, including foreign relations, are in the control of the executive, not the judiciary.

The agreement for arbitration was an international compact between two governments. The questions above outlined were not only submitted to and decided by the Commission, but have been the subject of a diplomatic dispute between Germany and the United States. The Secretary of State has consistently taken the position that the Commission had power to settle the question of its power to reopen and its competency to act in the situations above described. He has rejected Germany's protests against the reopening and the continued functioning of the Commission after Germany withdrew, and has recognized the awards.

The question arises whether this controversy is of a political nature involving foreign relations, belonging under the Constitution exclusively to the Executive Department, and thus not justiciable in the courts.

It was on this point that both of the courts below rested their decisions.

Second—The Commission's decisions are conclusive, not only because the Commission was an international tribunal, but also by reason of the familiar principle of *res judicata* applicable to the decisions of any tribunal.

Each question as to the powers of the Commission and the validity of the awards, now raised by petitioners, has been considered and decided by the Commission. Was it not competent for the Commission to decide such questions which came before it for decision? Are its decisions not binding on the two governments, and, therefore, on any private citizen whose only interest is through and under the United States? Is it open to any private citizen to question an award which is acceptable to the United States? Has either government contemplated or consented that the decisions of the Commission are subject to review in the domestic courts of either country?

There is also a subordinate question relating to the propriety of summary judgment in this case.

TREATIES AND STATUTES INVOLVED

The Knox-Porter Resolution (42 Stat. 105, 106), approved July 2, 1921, provided that all property of the German Government, and of its nationals, which, on or after April 6, 1917, had come into the possession or under control of the United States, should be retained by the United States

> "until such time as the Imperial German Government * * * shall have * * * made suitable provision

> for the satisfaction of all claims * * * of all persons, wheresoever domiciled, who owe permanent allegiance to the United States of America and who have suffered through the acts of the Imperial German Government, or its agents * * * since July 31, 1914, loss, damage, or injury to their persons or property * * * " (R. 78-79).

The foregoing resolution was incorporated in the Treaty of Berlin of August 25, 1921 (42 Stat. 1939). Subsequently, an Executive Agreement between the United States and Germany was signed at Berlin on August 10, 1922 (42 Stat. 2200; R. 15-18) providing for the creation of a Mixed Claims Commission to determine the amount to be paid by Germany to the United States in satisfaction of Germany's financial obligations under the Treaty. The Commission was to consist of three members, one commissioner to be appointed by each government and an umpire to be selected by agreement of the two governments (Art. II). It was provided that the Umpire should

> "decide upon any cases concerning which the commissioners may disagree, *or upon any points of difference that may arise in the course of their proceedings.* Should the Umpire or any of the Commissioners die or retire, or be unable for any reason to discharge his functions the same procedure shall be followed for filling the vacancy as was followed in appointing him" (Art. II) [Italics supplied];

and that

> "The decisions of the commission and those of the umpire (in case there may be any) shall be

accepted as final and binding upon the two Governments" (Art. VI);

and that

> "The two Governments may designate agents and counsel who may present oral or written arguments to the commission" (Art. VI).

The parties before the Commission were the two governments, United States and Germany (R. 81, 82). All claims presented to the Commission were made by the United States, on its own behalf or on behalf of its nationals, and the conduct and control of the prosecution of such claims rested solely with the United States (R. 81).

On March 10, 1928, the Congress of the United States enacted the Settlement of War Claims Act of 1928 (45 Stat. 254), which Act created in the United States Treasury a German Special Deposit Account, composed in part of all sums invested or transferred by the Alien Property Custodian under the Trading with the Enemy Act, and of all money received by the United States in respect of claims against Germany on account of the awards of the Mixed Claims Commission. The Act provides that out of that Account shall be paid the losses of American nationals which have been the subject of awards. Pertinent provisions of this Act are as follows:

> "Sec. 2. (a) The Secretary of State shall, from time to time, certify to the Secretary of the Treasury the awards of the Mixed Claims Commission, United States and Germany, established in pursuance of the agreement of August 10, 1922, between the United States and Germany (referred to in this Act as the 'Mixed Claims Commission').

(b) The Secretary of the Treasury is authorized and directed to pay an amount equal to the principal of each award so certified, plus the interest thereon, in accordance with the award, accruing before January 1, 1928.

(c) The Secretary of the Treasury is authorized and directed to pay annually (as nearly as may be) simple interest, at the rate of 5 per centum per annum, upon the amounts payable under subsection (b) and remaining unpaid, beginning January 1, 1928, until paid.

(d) The payments authorized by subsection (b) or (c) shall be made in accordance with such regulations as the Secretary of the Treasury may prescribe, but only out of the German special deposit account created by section 4, within the limitations hereinafter prescribed, and in the order of priority provided in subsection (c) of section 4."

The Settlement of War Claims Act also made provision for the immediate return to the former German owners of 80% of the property referred to in the Knox-Porter Resolution, and for immediate payments to German holders of 50% of the awards of the War Claims Arbiter, the eventual return to German nationals of the balance of the seized German property, and payment of the remaining 50% of the Arbiter's awards.

Germany agreed to replenish the Special Deposit Account by payments on bonds which it deposited in the Treasury of the United States in a total principal amount of about $505,000,000 (at par of exchange) with maturities spaced over a period of 52 years (Debt Funding Agreement of June 23, 1930, executed pursuant to the Act of June 5, 1930, 46 Stat. 500, Report of Secretary of

Treasury 1930, pp. 341, 347, 354, 357). Germany has been in default on maturities of these bonds for a period of over five years (R. 43-44).

HISTORY OF THIS LITIGATION

The action was commenced in the United States District Court for the District of Columbia by Z. & F. Assets Realization Corporation against the Secretary of State and the Secretary of the Treasury, to enjoin the certification and payment of the sabotage awards and to have those awards declared void (R. 12).

The Secretary of State certified the awards to the Treasury, after the complaint was filed, but before service of summons on him (R. 311-12). The plaintiff did not apply for a temporary injunction or restraining order.

The Lehigh Valley Railroad Company, on behalf of which a sabotage award had been made to the United States, intervened as a defendant for itself and the other sabotage awardholders (R. 33).

The American-Hawaiian Steamship Company intervened as a co-plaintiff asking the same relief sought by plaintiff (R. 31-32).

Thereupon, the Lehigh Valley Railroad Company moved for summary judgment under Rule 56(c) of the Rules of Civil Procedure, which provides for such a judgment

> "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

In support of its motion for summary judgment, the Lehigh Valley Railroad Company relied on the pleadings, and on the records, proceedings and opinions of the Commission and other facts disclosed in the affidavit of Honorable Harold H. Martin (R. 77-112), representative of the United States before the Commission.

The two Secretaries moved for dismissal of the complaint, on the ground that the questions as to the powers of the Commission and the validity of the awards were political questions, and that the decisions of the Mixed Claims Commission were not subject to review in the courts.

The District Court granted both motions, saying:

> "In my opinion the court has no power to grant the relief sought by the plaintiff. The claims made before the Commission were the claims of the United States. Whether these claims were properly allowed or not was a question to be raised by the United States and not by individuals who might be wronged by the action of the Commission. If there was any breach of the treaty between the two governments the only recourse would be by action of the contracting parties." (R. 297)

The plaintiffs then appealed to the United States Court of Appeals for the District, where the judgment was affirmed, on the ground that the judicial branch will not interfere in political matters, and that the questions raised by these petitioners as to the powers of the Commission and the validity of the awards were matters of foreign relations within the exclusive province of the executive branch, on which, in a diplomatic dispute with Germany, the Secretary of State already had taken a definite stand.

In both the District Court and the Court of Appeals the Lehigh Valley Railroad, in addition to urging the point

considered by the courts below, made all the points presented in this brief.

STATEMENT

The Knox-Porter Resolution of July 2, 1921 (42 Stat. 105), having directed the retention of seized German property by the United States until Germany made suitable provision for the satisfaction of claims of United States nationals against Germany arising out of or in consequence of the war, and the same provision having been incorporated in the Treaty of Berlin (August 25, 1921; 42 Stat. 1939), the two Governments, on August 10, 1922, signed an agreement (42 Stat. 2200; R. 15-18) establishing the Mixed Claims Commission, to determine the amount to be paid by Germany in satisfaction of Germany's financial obligations under the Treaty of August 25, 1921.

The establishment of that Commission was an essential part of the "suitable provision" to be made by Germany, as a condition to the return of property of German nationals in the possession of the United States.

The Commission was organized, and among the claims filed with the Commission by the United States were the so-called "sabotage" claims, here involved, arising out of the destruction of property by fires and explosions in July, 1916, at the Black Tom terminal in New York Harbor, and at Kingsland, New Jersey, in January, 1917 (R. 82-83). These claims were filed in 1927. On October 16, 1930, the Commission dismissed the claims, finding that Germany had authorized sabotage in the United States, but that the United States had failed to prove that Germany had caused the destructions at Black Tom and Kingsland (R. 82, 260, *et seq.*).

Petitions for rehearing in 1931

A petition for a rehearing of the claims was denied March 30, 1931 (R. 85). On July 1, 1931, the United States filed a supplemental petition on the ground of newly discovered evidence (R. 86). After disagreement between the Commissioners, who had participated in the 1930 decision, the Umpire denied that petition on December 3, 1932 (R. 138). (The decision of December 3, 1932, was set aside June 3, 1936 by *unanimous* vote of the Commission, the Umpire in his opinion stating that he had been misled by false charges that the United States had suppressed important evidence (R. 138-140).)

In dealing with those two petitions the Commission did not find it necessary to pass on its power to reopen.

At the hearing of the supplemental petition for rehearing in 1932 the American Agent said:

> "I am not sure what the attitude of Germany may be in reference to the jurisdictional question. I am not certain whether it is the attitude of Germany that it will not submit to this Commission jurisdictional questions for its consideration and determination. If that be the attitude of Germany, I think we should know it at the very beginning. I think we should have known it a year and a half ago. If that be the attitude of Germany, then all that has occurred during the past year and a half has been useless. If Germany takes the position that this Commission has no right to consider and determine the jurisdictional question, then this whole proceeding for the past year and a half has been little less than a farce."

Thereupon, the following discussion took place:

"The Umpire. What I understood and what we all understood the German Agent to suggest was that he presents to this Commission the proposition that its construction of the treaty should be that it has no power now to rehear this case. I did not understand him to take the position that the Commission could not consider the question of its own jurisdiction. If he desires to clear that question, he may do so.

The German Agent. The understanding of the Commission is entirely correct.

The Umpire. In other words, that is a justiciable question here.

The German Agent. Yes.

The American Agent. I am very glad to have that cleared up at the beginning of the argument." (R. 87-88)

1933 Petition for rehearing and Commission's decision of December 15, 1933, on power to reopen

A new petition was filed by the United States on May 4, 1933, to reopen the cases, for the reason, then for the first time alleged, that the decisions of 1930 and 1932 had been obtained by Germany by fraud and collusion (R. 115). The German Commissioner in a letter dated May 5, 1933, to the American Commissioner said

> "My Government * * * advises me to bring now the question whether or not our Commission has the right to reopen to a final decision." (Ops. & Decs. 1933-1939, Appendix p. VII)

Conflicting opinions were expressed by the two Commissioners as to the power of the Commission to entertain petitions for rehearings, and Germany advised the Secretary of State that in its view the Commission was without

power to entertain a petition to reopen (R. 124). The Secretary of State then stated:

> "It is the view of the Department that the question whether the Commission has jurisdiction to entertain petitions for rehearing is one properly to be decided by the Commission itself." (R. 123)

On December 15, 1933, the Umpire, Mr. Justice Roberts, held that the Commission had power to reopen the cases and either confirm the decisions theretofore made or alter them as justice and right might require (R. 45-59).

Result of 1933 decision

The two governments acted upon that decision, and from time to time filed much additional evidence (R. 95, 96, 157-58). The cases have been as actively litigated since 1933 as before, if not more so, except for an interval of about one year in 1936-37 when proceedings were suspended at Germany's request to enable her to negotiate for a settlement.* By an exchange of notes in May, 1934, the two Governments agreed that all cases pending before the Commission had been disposed of, except the sabotage cases and one other claim (R. 135-37).

The German Agent was given opportunity by a special order of the Commission of December 1, 1937, to file any evidence he desired, a privilege which he exercised (R. 157-58). Regardless of any protests Germany had made or rights it attempted to reserve, it continued for six years to litigate the question of fact as to whether the 1930 decision was obtained by fraud.

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*An agreement of settlement was signed at Munich, but was not carried out as Germany repudiated it by refusing to present it to the Commission (R. 96).

That Germany recognized that the decision of December 15, 1933, upholding the power to reopen was controlling, unless the Commission vacated it, is evidenced by the following statement in the brief of the German Agent filed November 16, 1938:

> "Should the request of the American Agent to pass upon the merits of the claims be construed as a request to reverse the decisions of July 29, 1935 and June 3rd, 1936 (the latter insofar as it confines the litigation to the issue of fraud), the German Agent wishes to state, that in that case he will request the Commission to review its decision of December 15, 1933 concerning the question of jurisdiction to entertain a petition for rehearing in a case finally decided." (R. 97)

Commission's rules and orders respecting procedure

The sabotage claims were the subject of several special rules of procedure issued, and from time to time modified, by the Commission. Special rules declared that the Umpire would sit with the Commissioners in the hearings (R. 84-86). The propriety of that procedure was later questioned by the American Agent and was sustained by the Commission (R. 85-86). An early rule adopted by the Commission on February 14, 1924, requiring a certificate of disagreement to be signed by both Commissioners, (R. 51) was held in the decision of the Commission of December 15, 1933, to have been adopted merely for the convenience of the Commission and not to be essential if there was in fact a disagreement (R. 51-52, see also R. 126-27). The Agreement of August 10, 1922, contains no requirement for such a certificate.

In 1935 the American Agent filed a motion for an order to fix the procedure so that the question of reopening and

the question of Germany's responsibility be argued and decided together, urging that the evidence bore on both and that they were inseparable. Germany objected, and on July 29, 1935, the Commission entered an order denying the motion (R. 144), which it reiterated June 3, 1936 (R. 140).

The Commission's decision of June 3, 1936.

In May, 1936, the cases again came before the Commission on the petition to reopen for fraud, and were fully argued on the facts, the oral argument extending from May 12th to May 28th (R. 95).

On June 3, 1936, the Commission rendered a *unanimous* decision (R. 138-40) setting aside its decision of December 3, 1932 (described *supra*, p. 13). The 1936 decision was on the ground that in rendering the decision of 1932 the Umpire (who had cast the deciding vote for Germany) had been misled by false charges that the United States had suppressed important evidence (Decisions & Opinions of Commission from 1926 to 1932, pp. 1015, 1016, 1028). The 1936 decision, however, postponed action on the question of setting aside the decision of 1930.

The 1939 hearing.

Much additional evidence having been filed by both Governments, the Commission, in January, 1939, with the German Commissioner sitting, heard argument for a period of twelve days (R. 96). Voluminous briefs had been filed by both Governments covering the whole field of evidence. In his brief filed September 13, 1938, the American Agent renewed his request that the Commission make "one bite" of the case, and that, if it set aside the 1930 decision, it

simultaneously pass on Germany's responsibility for the destructions. He there said:

> "The respective governments have spent years in the collection of evidence without any restriction on its nature and almost without limitation as to the time afforded to file it. Since the 1936 hearing the German Agent has been permitted to file, and has filed, evidence without regard to whether it related to the so-called fraud issue or to the cases on the merits—a distinction which, for all practical purposes, has long since disappeared. By reason of the fact that it has been a requisite part of the American Agent's case to prove that the Commission has been misled on material issues by false evidence, the very proof which has been introduced to support the pending motions necessarily affects the merits of the cases. The Hermann message, for example, alone establishes the responsibility of Germany; other contemporaneous documents which lead to the responsibility of Germany for the destructions simultaneously prove the falsity of the entire German defense.
>
> Further argument on the merits would, therefore, be only a form and would constitute a source of delay not warranted by any considerations of justice to the parties.
>
> The American Agent, therefore, requests the Commission not only to set aside but to reverse the Hamburg decision and thus render a final decision in favor of the United States in both cases." (R. 97)

The American Agent made the same request at the oral argument (R. 97), referring to the fact that the German Agent had discussed the merits (R. 98).

At the close of the 1939 hearing the following questions were before the Commission awaiting decision:

1. The question whether the decision of 1930, against the United States, had been obtained by fraud on the part of Germany.

2. The question whether the American Agent's demand that the Commission proceed at once to decide the "merits"—Germany's responsibility for the sabotage—should be granted.

3. The question whether, *on the entire record as it stood*, the United States had established Germany's responsibility. That issue was raised by the argument of the German Agent on the theory that it would be futile to reopen, if the United States could not gain awards, and a finding on the point was insisted upon by the German Commissioner. It is so stated in the opinion of the Umpire (R. 60), in the opinion of the American Commissioner (R. 158-59, 177-78), and in the letter of March 3, 1939, from the German Commissioner to the American Commissioner (R. 290).

4. The question of the nationality of Agency of Canadian Car & Foundry Company, which was covered in briefs filed by each side prior to the 1939 argument (R. 183).

The only question not argued was as to the amount of damages. The evidence for the United States on that subject had been filed long before (R. 108). Germany had offered no evidence on the subject. The only stipulation regarding damages deferred consideration of certain questions as to the *measure* of damages until the question of liability was settled (R. 84).

Retirement of the German Commissioner

At the close of the hearings January 27, 1939, the Commission began its conferences (R. 98, 158). In the deliberations which followed, the Umpire and American Commissioner each stated that in his opinion the decision of 1930 had been obtained by fraud on the part of Germany (R. 60, 102, 158-59).

Thereupon, at the specific request of the German Commissioner, the Commission considered whether, upon the whole record, the United States had established the fact of Germany's responsibility for the explosions (*id.*). After this point had been the subject of discussion, the German Commissioner "retired" on March 1, 1939. That he did so because he found that the American Commissioner and the Umpire were definitely against him, and in order to frustrate the proceedings and prevent a decision adverse to Germany, and that his retirement for that purpose was brought about by his Government, is made clear by the record (R. 60, 102, 145-54, 159, 217). The petitioners have never argued to the contrary.

Both the Commission and the State Department were officially notified of his retirement (R. 100-01, 145, 150). The Commission notified the German Agent that a further meeting would be held (R. 99) June 15, 1939. Following that notice, and prior to the meeting, Germany stated, through announcements made to the Commission by the German Agent and to the Secretary of State by Germany's diplomatic representatives, that Germany would not appear at the meeting and that the withdrawal of the German Commissioner deprived the Commission of power to act (R. 152-54).

The German Embassy's letter follows (R. 153-54):

"(Translation)

German Embassy Washington, D. C.,
June 10, 1939.

Mr. Secretary of State:

I have the honor to advise Your Excellency of the following:

As the German Agent on the German-American Mixed Commission reports, a written notice from the American Secretary of the Commission, according to which the Commission will hold a meeting at 11 a. m. on June 15th in the large conference room of the United States Supreme Court Building, was received by him on June 7th of this year.

By direction of my Government, I call attention to the fact that since the withdrawal of the German Commissioner, Dr. Victor Huecking, on March 1st of this year, of which I notified the American Government by a note to Your Excellency of March 24th of this year, the Commission has been incompetent to make decisions and that consequently there is no legal basis for a meeting of the Commission at this stage. By direction of my Government, I advise you that the Government of the Reich will ignore the decision to call the meeting on June 15th, as well as any other act of the Commission that might take place in violation of the International Agreement of August 10, 1922 and the generally established rules of procedure.

Accept, Mr. Secretary of State, the renewed assurance of my most distinguished consideration.

THOMSEN.

His Excellency
Mr. Cordell Hull,
Secretary of State of the United States,
Washington, D. C."

The German Agent's letter to the Commission follows (R. 152):

"1439 Mass. Ave., N.W.
Washington, D. C.
June 10, 1939.

Mixed Claims Commission
United States and Germany
German Agency
Mr. Walter R. Dorsey,
American Joint Secretary,
Mixed Claims Commission,
United States and Germany,
Washington, D. C.

Dear Mr. Dorsey:—

With reference to the 'Notice of meeting', dated June 7, 1939, in which you inform me by direction of the American Commissioner that 'a meeting of the Mixed Claims Commission, United States and Germany, will be held on Thursday, June 15th, 1939, at 11:00 o'clock a. m., in the large conference room of the United States Supreme Court Building,' I hereby advise you that in view of the note addressed by my Government to the Department of State today, I shall not appear at the meeting.

Very truly yours,

(s) RICHARD PAULIG,
German Agent."

Proceedings of the Commission June 15, 1939

The Commission met on the date specified in the notice. The letters quoted above and correspondence between the German Commissioner and the Umpire and American Commissioner relating to the German Commissioner's retirement were placed in the record (R. 100, 101). The

American Commissioner, the Honorable Christopher B. Garnett, filed a thorough opinion* in which he found:

(1) That the Commission was competent to act, notwithstanding the retirement of the German Commissioner, which was for the purpose of frustrating the proceedings (R. 165-179);

(2) That the decision of 1930, dismissing the cases, had been obtained by fraud and suppression committed by Germany and should be set aside;

(3) That on the entire record the responsibility of Germany for the explosions had been established.

In connection with this last finding he called attention to the fact that both the German Agent and German Commissioner had invited this finding, on the ground that it would be futile to set the 1930 decision aside if it appeared that the United States could not eventually win. The American Commissioner said:

"In the course of these conferences, the American Commissioner expressed to the Umpire and to the German Commissioner his opinion that the decision at Hamburg** had been reached on false and fraudulent evidence and that the proof of fraud was sufficient to set aside the Hamburg decision and reopen the cases.

After the conferences had continued for a considerable time, the Umpire expressed himself in en-

*Mixed Claims Commission, United States and Germany, Opinions and Decisions in the Sabotage Claims Handed Down June 15, 1939 and October 30, 1939 (U. S. Gov't Print. Off., 1940), p. 1.

**Its 1930 decision is sometimes referred to by the Commission as "the Hamburg decision."

tire agreement with the American Commissioner on the question of fraud. Thereupon the German Commissioner argued that, if, upon an examination of the whole record, both before and subsequent to the Hamburg decision, the Commission were to come to the conclusion that the United States had not proven its case, even though there had been fraud in the evidence before The Hague argument, it would be necessary to dismiss the petition, and he urged upon the Umpire and the American Commissioner the necessity of considering the whole evidence for that purpose.

It was thereupon agreed that the whole record should be examined to determine whether the American case had been proven or not, and it was while the Commission was engaged in examining this question that the letters aforesaid of the German Commissioner were received." (R. 158-59)

That statement is confirmed by the German Commissioner's letter of March 3, 1939, to the American Commissioner, in which, pretending that he, the German Commissioner, was still "open minded" when he resigned and had not "disagreed", he said:

> "I surely reserved any decision of mine with respect to the question as to whether the cases should be reopened or not. This was a necessary consequence of the point of view held by all three of us, viz. that there could be no reopening, if the new decision on the old and new evidence taken together should be identical in tenor with the Hamburg-Decision." (R. 290)

The Umpire at the session of June 15, 1939 delivered an opinion concurring in the views of the American Commissioner (R. 59-62). Respecting the Commissioner's action and his own in considering whether and finding that

on the record as it stood Germany's responsibility for the explosions was proved, the Umpire said:

> "4. As set forth in the American Commissioner's opinion, he and the Umpire agreed in the conclusion that the motion should be granted because the United States had proved its allegation that fraud in the evidence presented by Germany misled the Commission and affected its decision in favor of Germany. The German Commissioner was apprised of this conclusion before he withdrew from the deliberations of the Commission. He insisted, nevertheless, that before the motion should be granted, the Commission should examine the proofs tendered by the United States, to determine whether the claims had been made good. This was on the ground that, though the Commission had been misled by false and fraudulent testimony, that fact would be immaterial if, as an independent consideration, the United States had in its own cases failed to sustain the burden of proof incumbent upon it. The American Commissioner and the Umpire thereupon agreed to go beyond what they thought the necessary function of the Commission in the circumstances and proceed to canvass with the German Commissioner the cases as made by the United States. During the course of this investigation the German Commissioner withdrew." (R. 60-61)

In conclusion he stated:

> "7. I find that, for the reason alleged by the United States in its petitions for rehearing,—material fraud in the proofs presented by Germany, and for the further reason that on the record as it now stands the claimants' cases are made out, the pending motions should be and they are granted." (R. 62)

The motions referred to were motions to reopen. Although the point urged in the brief and oral argument of the American Agent, that the Commission should finally decide the merits, was before the Commission, and the Commission might well have rendered a final decision on the merits;* its first order of June 15, 1939, did not go that far. It merely set the former decision aside, and made the finding of fact that, *on the entire record as it stood,* Germany's liability had been proved. This left the case so that it was still open to Germany to ask for a further hearing on the question of liability and to supplement the record as it stood, by further evidence; but Germany had declared that she would not again appear or take any part in the proceedings, and in view of the finding on the record as it stood, a further hearing on the same record was futile.

Thereupon, after the opinions of June 15, 1939, had been rendered, the American Agent arose and said:

> "If your Honors please, in view of the attitude of Germany, as expressed in the communications between the German Commissioner and the Umpire and the American Commissioner and the communication between the German Embassy and the Secretary of State of the United States, it is apparent

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*The claimed distinction between the issues of German fraud and German liability had become unreal (R. 97-98). The same evidence was relevant to both. For example, one of the important questions exhaustively litigated in the so-called fraud issue was the authenticity of a certain secret message which the Commission found to be authentic in its June 15, 1939, opinion (R. 61-62). As the Commission had repeatedly stated, that message alone, if authentic, was conclusive of Germany's liability (R. 120, 61).

that Germany does not intend to take any further part in the proceedings before this Commission, and seeks to avoid a final conclusion, and frustrate the work of the Commission. I therefore move at this time, if your Honors please, upon the record as it now stands, that awards be entered in accordance with the opinions which have been rendered today (R. 105-06).

The Commission granted said motion and on the same day duly entered an order upon the minutes of the Commission, reading as follows:

"1. The decision of October 16, 1930, reached at Hamburg be, and the same is hereby, set aside, revoked and annulled.

2. The Commission finds, on the record as it now stands, that the liability of Germany in both the Black Tom and Kingsland cases has been established.

3. It appearing from the communications, each dated June 10, 1939, one from the German Agent to the Commission, and the other from the German Embassy to the Secretary of State, that Germany does not intend to exercise her right to take further part in the proceedings of the Commission, and that on the findings made and opinions handed down this day by the Commission, and from what appears in the record, awards should now be rendered to the United States on behalf of claimants; the American Agent is directed to prepare and submit to the Commission for its approval awards in each of the pending sabotage claims. These awards will be considered at a further meeting of the Commission to be called on notice, and appropriate action thereon will then be taken." (R. 106)

The Commission adjourned subject to call, postponing to the later meeting its opinion on the nationality question

involved in the case of Agency of Canadian Car & Foundry Company, and the fixing of the damages.

Germany was apprised of the action taken June 15, 1939 (R. 106, 197, 198).

The later meeting was called for October 30, 1939, and due notice of it was given the German Agent (R. 106-7).

Meanwhile, on October 3, 1939, the German Embassy sent another* letter to the Secretary of State with a request that copies be forwarded to the Commission, which was done (R. 195-216). In it Germany asserted again her position

> 1. That the retirement of the German Commissioner deprived the Commission of power to function.
>
> 2. That an award to the United States on behalf of the Agency of Canadian Car & Foundry Company, Ltd., a New York corporation, should not be granted because not within the scope of the Agreement of August 10, 1922.
>
> 3. That decisions of the Commission to the contrary on these points are or would be void.

Germany's letter also charges other irregularities in the proceedings and complains of the Umpire, by alleging he was so fixed in his opinion of Germany's fraud and guilt in causing the explosions, that he was not receptive to arguments of the German Commissioner. Those statements serve to emphasize that the Americans on the one hand and the German Commissioner on the other had definite and declared opposed views, constituting a disagreement in fact,

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*See also Germany's July, 1939, protest to the State Department to the same effect (R. 291-94).

and that the reason for the German's retirement was to prevent a decision adverse to his Government.

The Secretary of State, adhering to his view that all the questions, including those of power, were for the Commission to settle, said in his reply to Germany of October 18, 1939:

> "I must refrain from engaging a discussion of the various complaints and protests set out in your communication and content myself by stating that since the Department is without jurisdiction over the Commission I consider that it would be highly inappropriate for it to intervene directly or indirectly in the work of the Commission or to endeavor, in the slightest manner, to determine the course of its proceedings.
>
> I have entire confidence in the ability and integrity of the Umpire and the Commissioner appointed by the United States despite your severe and, I believe, entirely unwarranted criticisms, and I am constrained to invite your attention to the fact that the remarkable action of the Commissioner appointed by Germany was apparently designed to frustrate or postpone indefinitely the work of the Commission at a time when, after years of labor on the particular cases involved, it was expected that its functions would be brought to a conclusion." (R. 217)

Proceedings of the Commission October 30, 1939

At the Commission's meeting of October 30, 1939, of which Germany had due notice, Germany again failed to appear.

At that meeting the American Commissioner and Umpire filed opinions holding that the Agency of Canadian Car & Foundry Company, Ltd., a New York corporation, was an American national and that its claim was cognizable under the terms of the Agreement of August 10, 1922 (R.

30, 182-195), a question covered by briefs filed in 1937 and 1939 (R. 183), and under submission, as the Umpire pointed out in his opinion (R. 195).

The awards were then entered.

In the brief of Z. & F. Assets Realization Corporation, it is said (p. 6):

> "The alleged awards were made without any testimony being taken as to the extent of the damages. The fixing of the amount of the damages was *ex parte.*"

And on page 15:

> "the American Umpire after *alleged* conferences with the American Commissioner, without counter evidence submitted by the German Government, and *without notice to it* determined the amount of damages". (Italics ours.)

That brief is replete with inaccurate or incomplete statements of the facts of this case and the facts involved in cited decisions, of which the foregoing is an example, and it has the added vice that it questions the veracity of the Umpire and American Commissioner.

Voluminous evidence for the United States on the question of damages had been filed years previously and copies then furnished to the German Agent (R. 41, 108). Between the meetings of June 15 and October 30, 1939, that evidence was carefully examined by the Commission, and the record of the meeting of October 30 contains the following statements by the American Commissioner and the Umpire:

> "The American Commissioner: In accordance with the orders entered on June 15, 1939, the American Agent and the Acting American Agent pre-

pared and submitted to the Commission for its approval memoranda relating to all the pending sabotage claims and the awards to be entered.

Some of the questions which have arisen in the study of these cases are of a legal character, in which I have furnished the Umpire memoranda of the Acting American Agent and memoranda prepared by me relating thereto.

I have thoroughly examined the files for the purpose of determining the correct measure of damages in all of these cases, and have furnished the Umpire memoranda relating thereto. I have also furnished him a memorandum prepared by the Acting American Agent relating to the question of damages.

Wherever the files disclosed as (*sic*) a question of fact or of law was raised, I have discussed it with the Umpire personally. I have presented to him for his consideration an award in each of the 153 sabotage cases.

The Umpire, thereupon, at the same meeting said:

The Umpire: After a study of the data and the records and the memoranda prepared, I have found that the awards are, in my judgment, accurately and properly calculated, and have joined the American Commissioner in signing the awards. They will be accordingly filed in the records of the Commission." (R. 107)

The affidavit of Honorable Harold H. Martin, Acting American Agent, states:

"Extensive proofs of damages suffered by the sabotage claimants were in the record at the time of the retirement of the German Commissioner consisting of material contained in the Memorials of the respective claimants and evidence in voluminous ex-

hibits filed with the Commission over a period extending from approximately March, 1927, to November, 1936. Copies of all such Memorials and exhibits, according to the practice of the Commission were furnished to the German Agent on or about the date of the respective filing dates of such Memorials and exhibits. No evidence respecting damages was submitted to the Commission subsequent to November, 1936." (R. 108)

The evidence on damages was carefully sifted and the awards were some $2,000,000 less than the claims presented by the United States (R. 82, 63-73).

As to notice, the order of June 15, 1939, notified Germany that the Commission would proceed to fix the damages and hold a later meeting to settle them. Due notice of that later meeting was given the German Agent (R. 106-107) and Germany was aware of the purpose of the meeting (R. 197-98, 213, 215).

Germany had an opportunity at the meeting of June 15, 1939, or even at the meeting of October 30, 1939, or at any time during the interval, to introduce evidence on damages. At any time between those dates she could have participated in the computation of damages, and at the meeting of October 30, 1939, it was still open to her to appear and be heard as to the amount.

Instead she chose to remain away.

Upon their entry the awards were presented to the Secretary of State. All the attacks on the Commission's action were by that time an old story to the State Department. The attacks had previously been brought to its attention by the German Embassy, had been considered and rejected before the awards were entered. The awards were therefore certified to the Treasury for payment (R. 110, 312, 318).

SUMMARY OF ARGUMENT

I. The validity of the awards is not open to inquiry in the Courts and the case does not present a justiciable controversy, because:

1. The question of validity is the subject of a dispute between the two Governments, involving the powers of the Commission and the interpretation of an international compact, to which they are parties. The question is a political one, to determine it involves interference in foreign relations, which are exclusively within the province of the Executive Department; and

2. The Mixed Claims Commission is an international tribunal, whose decisions, including those on its own jurisdiction, are not open to review in our domestic courts. Furthermore, its decisions as to its own jurisdiction are *res judicata* as between the two Governments, and as to petitioners, whose only interest is derived from the United States.

II. If the Court does inquire into the validity of the awards, they should be sustained, because:

1. The Commission had power to grant a rehearing, and vacate an earlier decision, on the ground that it had been obtained by fraud.

That is a power inherent in every such tribunal while it continues to sit. The provision in the Agreement of August 10, 1922, that the Commission's decisions should be "final and binding on the two governments" excludes a review by any other court or in any other place, but does not forbid the Commission to reconsider its own decisions.

2. The withdrawal by Germany of her Commissioner, after the cases were before the Commission for decision, for the purpose of frustrating the proceedings and preventing a decision against her, was ineffective to prevent the two remaining members from proceeding with and disposing of the case.

Before the German Commissioner retired, all questions in litigation had been argued and submitted, except that of the measure of damages.

Moreover, Germany could not have frustrated the proceedings by withdrawal of her Commissioner at any stage. Restoration of seized German property had been made in reliance on her proceeding in good faith to complete the arbitration.

3. The Agency of Canadian Car & Foundry Company, a New York corporation, was an American national, under the terms of the Agreement of August 10, 1922, and the claim presented by the United States on account of the destruction of its property was properly cognizable by the Commission.

The question of nationality was involved in every claim considered by the Commission, and was one of the questions it was expected to decide.

III. The miscellaneous contentions of the petitioners are wholly without merit.

ARGUMENT

I

THE VALIDITY OF THE AWARDS IS NOT OPEN TO INQUIRY IN THE COURTS AND THE CASE DOES NOT PRESENT A JUSTICIABLE CONTROVERSY.

1. The question of the validity of the awards, involving as it does a dispute between the two Governments about the jurisdiction and powers of the Commission and the interpretation and effect of an international compact between the United States and Germany, is a political matter involving foreign relations, in which, under our Constitution, the Judicial Department may not interfere.

This point is ably and exhaustively treated in the opinion of Justice Miller in the Court of Appeals.

That the dispute over the action of the Commission is a matter involving foreign relations, is clear.

The Agreement of August 10, 1922, is an international compact, to which only the two governments are parties. The Mixed Claims Commission is an international tribunal created by two sovereign nations to determine

> "the amount to be paid by Germany in satisfaction of Germany's financial obligations"

under the Treaty of Berlin, in a litigation to be conducted before it by the two governments. Its awards are awards in favor of the United States. The only parties before the Commission are the two governments (R. 81-82). *Frelinghuysen* v. *Key*, 110 U. S. 63, 71, 72; *La Abra Silver Mining Co.* v. *United States*, 175 U. S. 423, 458; *United States* v. *Diekelman*, 92 U. S. 520, 524. The wrong for which the

United States sought redress was an injury to its sovereignty by wrongful acts committed by Germany. Although the damages may be measured by the losses of its citizens, the citizens do not receive the proceeds of an award by virtue of the international agreement. Their interests are derived from an Act of Congress. In the absence of such legislation there may be a moral obligation of the Government to hand the proceeds of an award over to the citizens who suffered the loss, but it is under no legal obligation to do so. *Williams* v. *Heard,* 140 U. S. 529, 537; *Boynton* v. *Blaine,* 139 U. S. 306, 323.

In *Williams* v. *Heard, supra,* considering the Colombian claims, the Court said:

> "It was held in *United States* v. *Weld,* 127 U. S. 51, that this award was made to the United States as a nation. The fund was, at all events, a national fund to be distributed by Congress as it saw fit. True, as citizens of the United States had suffered in person and property by reason of the acts of the Confederate cruisers, and as justice demanded that such losses should be made good by the government of Great Britain, the most natural disposition of the fund that could be made by Congress was in payment of such losses. But no individual claimant had, as a matter of strict legal or equitable right, any lien upon the fund awarded, nor was Congress under any legal or equitable obligation to pay any claim out of the proceeds of that fund. * * * There was, undoubtedly, a moral obligation on the United States to bestow the fund received upon the individuals who had suffered losses at the hands of the Confederate cruisers; and in this sense all the claims of whatsoever nature were possessed of greater or less pecuniary value."

As Secretary of State Frelinghuysen said with reference to another international arbitral tribunal adjudicating claims similar to those on which the sabotage awards are based:

> "The Commission is not a judicial tribunal adjudging private rights but an international tribunal adjudging national rights." (Moore; VI Digest Int. Law, § 1055, pp. 1015-6.)

See also *Mavormattis* case, Permanent Court of International Justice, 1 Hudson, World Court Reports, pp. 302, 337-38; *United States ex rel. Angarica* v. *Bayard*, 127 U. S. 251, 259 (1888); *U. S.* v. *Diekelman*, 92 U. S. 520, 524 (1875); Distribution of Alsop Award by the Secretary of State, Opinion of the Solicitor for the Department of State, J. Reuben Clark, Jr., Aug. 14, 1912 (Wash. Govt. Printing Office, 1912) page 14.

The "national" aspect of the claims presented to the Mixed Claims Commission has been emphasized by the Commission and the courts. *Administrative Decision No. II*, Mixed Claims Commission Decs. & Ops. p. 8 (R. 81-82); *Standard Marine Insurance Co.* v. *Westchester Fire Insurance Co.*, 19 F. Supp. 334, at page 338 (S. D. N. Y. 1937), aff'd 93 F. (2d) 286 (C. C. A. 2d, 1937), cert. den. 303 U. S. 661.

Both lower courts here recognized this essential nature of the claims:

> "The claims made before the Commission were the claims of the United States." (District Court—R. 297)

> "That tribunal dealt only with the two governments, had no relations with claimants, and could

> take cognizance only of claims presented by or through the respective governments. * * * While claims of individual citizens presented by their respective governments were to be considered by the Commission in determining amounts, the whole purpose of the agreement was to ascertain how much was due from one government to the other on account of the demands of their respective citizens." (Court of Appeals—R. 349-50)

In this case there is not merely a potential but an actual controversy between the two governments. As the opinion below points out, every ground of attack by petitioners on the validity of these awards has been urged by Germany, through its Embassy, to the Secretary of State, and the latter has taken a definite position on them, rejecting them all. Whether his reason for rejecting them was because the Commission had decided them and he considered its decisions to be within its powers and binding, or whether he had formed his own opinion on the points, is of no more than secondary importance. (The Secretary's letter—R. 217—about the attempt of Germany to frustrate, shows he had very decided views of his own about that.) The diplomatic dispute still remains. For the courts of the United States to sustain any one of the claims of petitioners, would be to place the courts in direct conflict with the Executive Department in an active dispute between the two governments as to the interpretation of an agreement between them, and over the powers of a commission established by them to determine the right of one government to redress from the other. It would result in the courts rejecting an award in favor of the United States which the Executive Department has accepted and insists on executing.

Petitioners' position can not be stated without disclosing the interference in foreign affairs involved in the relief they ask. In their own words (Brief in No. 381, p. 28):

> "It is plain that, in the present instance, neither the *proper* and *lawful* conduct of our foreign affairs, nor the proper and lawful conduct of our domestic affairs, would in any way be impeded by a judicial determination that the so-called awards now in question was the result either of a mistaken view of the law or the facts, or of a usurpation of power.
>
> "Such a determination would in no way embarass the Executive in securing a *proper* determination, by arbitration or otherwise, of the sabotage claims; * * *" [Italics ours]

In other words, petitioners ask this Court to pass on the *propriety* of the conduct of our foreign relations by the executive branch. The sequel to this case, as petitioners visualize it, would find the United States forced to re-negotiate the claims for German sabotage occurring twenty-four years ago—to re-negotiate them with a country which is in default on the bonds it pledged in 1930 to secure payment of those and other claims and which has sought by continued irregular devices to frustrate any adverse arbitral determination of the sabotage claims. Such negotiation failing, the choice of this country would be either resort to war or the abandonment of the claims. No case of a more direct interference in foreign relations can be imagined than that which the petitioners ask this Court to undertake.

"Political" questions, and particularly political questions which concern the conduct of this country's foreign relations, have been held by this Court throughout its history to be non-justiciable. Early pronouncements of the doc-

trine are found in *Ware* v. *Hylton*, 3 Dall. (U. S.) 199, 260 (1796), and *Foster* v. *Neilson*, 2 Pet. 253, 307 (1829). The most recent case is *Coleman* v. *Miller*, 307 U. S. 433, at 454-55, 457 (1939). In the intervening period the same doctrine has often been enunciated.*

The same principle of judicial non-interference in the field of foreign affairs has been consistently followed in England since the early days. See *Rustomjee* v. *The Queen*, [1876-77] 2 Q. B. D. 69, at 74 (which also involved moneys collected by a sovereign for her subjects); and *West Rand Central Gold Mining Company, Ltd.* v. *The King* [1905] 2 K. B. 391.

Petitioners' argument (No. 381, Pt. I) on this score is that courts will determine political questions where "private rights" are involved. Although the boundaries of the field of political questions have not been very clearly defined, in no case has this Court ever interfered in the conduct of foreign relations irrespective of what so-called "private rights" were affected by executive action in that sphere.

Where interference with this country's conduct of foreign affairs will result from the adjudication of "private rights", the domestic courts decline to act. "If this were

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*See *Doe* v. *Braden*, 16 How. (U. S.) 635 (1853); *U. S.* v. *Lee*, 106 U. S. 196, 209 (1882); *Head Money Cases*, 112 U. S. 580, 598-99 (1884); *Whitney* v. *Robertson*, 124 U. S. 190, 193-5 (1888); *Botiller* v. *Dominguez*, 130 U. S. 238, 247 (1889); *Jones* v. *United States*, 137 U. S. 202, 212 (1890); *Terlinden* v. *Ames*, 184 U. S. 270 (1902); *Wilson* v. *Shaw*, 204 U. S. 24, 32 (1907); *Charlton* v. *Kelly*, 229 U. S. 447 (1913); *Oetjen* v. *Central Leather Co.*, 246 U. S. 297, 302 (1918); *Lehigh Val. R. R. Co.* v. *Russia*, 21 F. (2d) 396, 399-400 (C. C. A. 2d, 1927), cert. den. 275 U. S. 571; *George E. Warren Corporation* v. *United States*, 94 F. (2d) 597 (C. C. A. 2d, 1938), cert. den. 304 U. S. 572.

not the rule, cases might often arise, in which on the most important questions of foreign jurisdiction, there would be an irreconcilable difference between the executive and judicial department. * * * No well regulated government has ever sanctioned a principle so unwise, and so destructive of national character."*

The petitioners point out that treaties are often interpreted by the courts in litigation to which private persons are parties.

Treaties may have two aspects. They are always international compacts. If they purport to establish rights or liabilities of individuals, and are self-executing, they may, under our Constitution (Art. VI) have the force of domestic law and be applied as such. Extradition treaties, treaties giving aliens the right to own property, or receive it by inheritance, are of the latter type, and every case cited by the petitioners on this point was of that nature. But even in the interpretation of extradition treaties questions of foreign relations within the State Department's domain are held to be non-justiciable. *Terlinden* v. *Ames*, 184 U. S. 270 (1902) and *Charlton* v. *Kelly*, 229 U. S. 447 (1913).

The line of demarcation between treaty questions which are justiciable and those which are not was well stated by this Court in *Head Money Cases*, 112 U. S. 580, at 598-599:

> "A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail,

Williams v. *Suffolk Insurance Co.*, 13 Pet. (U. S.) 415, 420 (1839).

its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do and can give no redress. But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country. An illustration of this character is found in treaties, which regulate the mutual rights of citizens and subjects of the contracting nations in regard to rights of property by descent or inheritance, when the individuals concerned are aliens. The Constitution of the United States places such provisions as these in the same category as other laws of Congress by its declaration that 'this Constitution and the laws made in pursuance thereof, and all treaties made or which shall be made under authority of the United States, shall be the supreme law of the land.' A treaty, then, is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute."

And in *Foster* v. *Neilson,* 2 Pet. (U. S.) 253, 314, Chief Justice Marshall said:

"Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legis-

> lature, whenever it operates of itself, without the aid of any legislative provision. But when the terms of the stipulation import a contract—when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; * * * ."

The Agreement of August 10, 1922, does not purport to establish private rights. Whatever interest the petitioners have in the awards granted to the United States on account of their losses or in the money in the Treasury available for their payment, is derived not from the agreement establishing the Commission, but from an act of the Congress. *Williams* v. *Heard*, 140 U. S. 529, 537.

Even in those cases in which this Court has interpreted treaties which did prescribe private rights or liabilities, it has without exception, we believe, refrained from interfering with the State Department in its conduct of foreign affairs.

The text writers, including those who are critical of some aspects of the limitation on justiciable questions, unanimously approve the doctrine that

> "the Court must forego its power of interpretation where the executive has created a situation as to which interference, contradiction, even the suggestion of a doubt, may be dangerous or impolitic." Jaffe, *Judicial Aspects of Foreign Relations*, (Harvard Studies in Administrative Law, 1933) p. 74.

That statement of Jaffe is directly applicable to this case.* As the Court of Appeals held, "there is no reason or

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*See also Crandall, Treaties, Their Making and Enforcement (Studies in History, Economics and Public Law, Columbia Univ. Vol. 21, No. 1, 1904) page 221; Finkelstein,

excuse for judicial interference. Such interference could result only in embarrassment to the political arm of the government in its conduct of the international affairs of the nation." (R. 349)

The petitioners contend that, although this case does involve foreign relations, it is essentially a controversy between private citizens over the right to a fund in the Treasury, but their entire case is predicated on the claim that the sabotage awards are void. To establish that they ask this Court to interpret the Agreement of August 10, 1922, and hold that the Commission's acts were beyond its powers, and thus dip directly into the existing diplomatic dispute between the two governments.

Petitioners, as they did below, seek support in the line of cases which deal, not with the *validity* of an award, but with *conflicts over asserted rights to receive payment* of an award, arising between original claimants and those claiming under them, or between two or more persons whose rights are derivative and who claim through assignments or transfers—disputes as to the proper persons entitled to the money on payment of a successful claim.*

Judicial Self-Limitation, 37 Harv. L. Rev. 338, at 347 (1924); Weston, *Political Questions*, 38 Harv. L. Rev. 296, 315-16, 327-328 (1925); Field, *The Doctrine of Political Questions in the Federal Courts*, 8 Minn. L. Rev. 485, at 486, 511 (1924); Potter, *The "Political" Question in International Law in the Courts of the United States*, VIII S. W. Political and Social Science Quarterly 127 (1927).

**Orinoco Co.* v. *Orinoco Iron Co.*, 296 Fed. 965 (App. D. C., 1924), aff'd sub nom. *Mellon* v. *Orinoco Iron Co.*, 266 U. S. 121 (1924); *Houston* v. *Ormes*, 252 U. S. 469 (1920); *Comegys* v. *Vasse*, 1 Peters 193 (1828); *Frevall* v. *Bache*, 14 Peters 95 (1840); *Judson* v. *Corcoran*, 17 How. 611

As both courts below pointed out, no such question is involved in this litigation (R. 298, 350-51). The determination of the proper person entitled to the proceeds of a particular award, once the United States has established a claim, presents no complication involving the executive department's action or power in international affairs and is a matter of domestic law for the local courts. This case would be comparable to those cited were petitioners alleging that they, and not the Lehigh Valley Railroad, owned Black Tom terminal when German sabotage agents destroyed it in July, 1916.

Petitioners rely particularly on the *Orinoco Iron Co.* case. A correct statement of that case discloses its utter lack of relevance and illustrates the distinction we have just made.

The plaintiff in that case sought to obtain moneys received by the United States from Venezuela on the theory that it was the real party injured by the expropriations of property for which Venezuela had paid the United States. The Court of Appeals for the District held (and before this Court it was assumed) that the company named in the award was "in the position of a trustee *ex maleficio* as to plaintiff"* (266 U. S. 121, at 125). The Secretary of State had answered plaintiff's claim to the money by advice that the issue of ownership of the claim was for the courts, as

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(1855); *Williams* v. *Heard*, 140 U. S. 529 (1891); *Matter of Westbrook*, 228 App. Div. 549 (N. Y. 1930).

See also *Doerschuck* v. *Mellon and Z. & F. Assets Realization Corp.*, 55 F. (2d) 741 (App. D. C., 1931); Decisions and Opinions of Commission to 1925, pp. 10, 913.

*The importance of the "trustee *ex maleficio*" relationship in the *Orinoco Iron Co.* case was emphasized in *Smith* v. *Harrah*, 51 F. (2d) 314 (App. D. C., 1931).

has long been the law (see other cases cited in footnote pp. 44-45, *supra*). The brief of the Secretary of the Treasury to this Court pointed out that *no attempt* had been made by the United States to determine the person entitled to the money.

Nor is petitioners' reliance on *Perkins* v. *Elg*, 307 U. S. 325 (1939), as a relevant decision justified. In that case the Secretary of State had denied a passport to a citizen of the United States on the incorrect premise that she was not a citizen. No question of interference in foreign relations was involved.

The provisions of the Settlement of War Claims Act of 1928 (*supra*, p. 8) routing awards of the Commission through the State Department for certification to the Treasury, instead of having the awards certified by the Commission to the Treasury, is a legislative recognition of the fact that the subject is one involving our agreements and relations with a foreign government, and gives the Secretary of State the opportunity to hold up an award, if he believed that it did an injustice to Germany, or for any other reason required correction. The Secretary of State had full power to refrain from certifying an award if it should seem open to objection. *Frelinghuysen* v. *Key*, 110 U. S. 63; *Boynton* v. *Blaine*, 139 U. S. 306; *La Abra Silver Mining Co.* v. *U. S.*, 175 U. S. 423.

In the *La Abra* case, jurisdiction to investigate the merits of an award of an international commission had been specifically conferred upon the Court of Claims by an act of Congress. Even there, the argument was advanced that Congress had no power to invest any court with jurisdiction to determine the validity of an international tribunal's award. In determining that the legislation was constitutional, this Court pointed out that the statute was enacted

at the suggestion of the executive branch of the Government, and this Court made it clear that, without legislation, the question of the validity of the awards would have been solely for the executive department, and not for the courts, to determine.

The Constitution wisely placed the power over foreign affairs with the executive. The one check is the advice and consent of the Senate in the making of treaties. And that exception to the "very delicate, plenary and executive power of the President as the sole organ of the federal government in the field of international relations" has always been strictly construed. See *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 319-22 (1936). To add a further veto power in the courts would stultify effective conduct of a most important function of the United States Government.

Petitioner, Z. & F. Assets Realization Corporation, cites *Colombia* v. *Cauca Company*, 190 U. S. 524, as an instance where this Court held that an international commission had exceeded its powers as to the measure of recovery, but the petitioner fails to explain that the agreement for arbitration in that case was not an international compact (see pages 50-52 Brief in No. 381). That agreement was between the Republic of Colombia and the Cauca Company, a private corporation. The United States brought the parties together, but was not itself a party to the arbitration. There was no dispute between the two Governments as to the award, and the only Government involved voluntarily submitted its case to the courts of the United States.

The court below said:

> "The present case is clearly distinguishable, also, from the case of *Colombia* v. *Cauca Co.*, relied upon

by appellants, in which a foreign government voluntarily submitted to an arbitration between itself and a private citizen of the United States and, thereafter, voluntarily submitted itself to the jurisdiction of a federal court to secure the determination of a controversy between itself and that private citizen, which arose out of the arbitration proceeding." (R. 353)

2. The decisions of the Commission, including those respecting its powers and jurisdiction, are not open to review or collateral attack in the domestic courts.

While closely related to the previous point, this proposition is not precisely the same, because it does not depend on the separation of powers under the Constitution.

As we have seen, the Agreement of August 10, 1922, is not a private contract, but an international compact for adjudication of claims of the United States against Germany. Our domestic courts have not, nor did they have before the Agreement was made, jurisdiction to adjudicate such claims. Germany has never consented to be sued in our courts, and the United States has never consented to have its domestic courts adjudicate its claims against Germany or interfere in any way with their enforcement.

The Commission is a tribunal with exclusive jurisdiction. The Agreement constituting it was made pursuant to a treaty and under authority of law, and has been, in effect, ratified by the Settlement of War Claims Act of 1928, which recognized the Commission and adopted it as part of the machinery for disposing of seized German property. The Agreement itself excludes review, directly or collaterally, by any other tribunal, of the Commission's decisions or awards.

The provision in the Agreement that the decisions of the Commission shall be "final and binding" on the two Governments (Art. VI, R. 18), though not preventing the Commission, while still sitting, from reconsidering its own rulings, does mean that, when the Commission is through with a case, the matter in dispute shall not be open to further inquiry in any other tribunal or in any other way. If its awards are binding on the two governments, *a fortiori* they are binding as to private citizens whose only interest in attacking them is acquired through or under the United States.

The Settlement of War Claims Act of 1928 does not contemplate that the action of the Commission may be reviewed by a domestic court, before payment.

Nothing in that Act or in any of petitioners' precedents, suggests any right in beneficiaries of awards to inquire into or attack in the courts the validity of other awards.

In *Comegys* v. *Vasse,* 1 Pet. 193, 211, it is said:

> "The object of the treaty was to invest the commission with full power and authority to receive, examine, and decide upon the amount and the validity of the asserted claims upon Spain for damages and injuries. Their decision, within the scope of this authority, is conclusive and final. If they pronounce the claim valid or invalid, if they ascertain the amount, their award in the premises is not reexaminable. The parties must abide by it, as the decree of a competent tribunal of exclusive jurisdiction."

Similarly, when Mexico threatened to institute proceedings in the United States Courts attacking certain awards of the United States-Mexican Commission, Secretary of State Evarts, in a letter dated August 4, 1880 to the Mexican Minister respecting awards of the Commission, said:

> "I find myself equally unable to regard an assertion of right on the part of Mexico to judicial action in any court or tribunal whatever, in review, in any form, or to any extent or effect, of these awards, or of a right to judicial obstruction to the execution of these awards in favor of the claimants, as otherwise than in distinct contradiction of the whole purpose of the convention as well as of the explicit provision of the fifth article thereof, which absolutely bars any agitation of right affecting the subjects embraced within the terms of the convention" (H. Ex. Doc. 103—48th Congress, First Session, p. 613).

That the Commission *must* pass on questions of interpretation of the Executive Agreement of August 10, 1922, in order to determine its own powers is beyond doubt. Petitioners have not argued to the contrary, although at one point (Brief in No. 381, pp. 67-69) one of them has confused that question with the questions of the Commission's ultimate power raised in this case.

There was some dispute between the two Governments about the Commission's deciding questions of its own jurisdiction. Germany admitted its power at one stage of the proceedings (see *supra,* pages 13-15) and, after raising the question in 1933 with respect to the Commission's decision on its power to reopen the cases, Germany later conformed to the Secretary of State's position and the Commission's decision that it had the power to decide its own jurisdiction, at least to the extent of continuing to litigate the charges of fraud and of treating the 1933 decision as controlling the proceedings (R. 89-90, 52-53, 135-36). With respect to the effect of her Commissioner's withdrawal, Germany's protests were directed to the Commission as well as

the Secretary of State (R. 215-16, 152-54). The Secretary of State again took the unequivocal position that the questions raised were for the Commission as it was then constituted to decide (R. 217). On the third issue of the Commission's power, the nationality question of Agency of Canadian Car & Foundry Company, the dispute as to the propriety of the award was brought before the Commission by the German Agent's motion and both Governments filed briefs on the point with the Commission (R. 109, 182-83, 195).

That an international arbitral tribunal has the power to determine its own jurisdiction has long been accepted in international law. As Lord Chancellor Loughborough said in answer to a similar question raised by the English commissioners in the arbitration under the Jay Treaty of 1794,

> *"the doubt respecting the authority of the Commissioners to settle their own jurisdiction was absurd,* * * * they must necessarily decide upon cases being within, or without, their competency"—(1 Moore, International Arbitrations, p. 327). (Italics ours.)

Daniel Webster, Secretary of State at the time of the United States-Mexican Claims Commission, Convention of April 11, 1839, in a letter dated January 21, 1842, to one of the Mexican Commissioners, said:

> "The mixed commission under the convention with that republic has always been considered by this government essentially a judicial tribunal, with independent attributes and powers in regard to its peculiar functions. *Its right and duty, therefore, like those of other judicial bodies, are to determine upon the nature and extent of its own jurisdiction,*

as well as to consider and decide upon the merits of the claims which might be laid before it." (S. Ex. Doc. 320, 27 Cong. 2 Sess. 185; 2 Moore, Int. Arb., p. 1242). (Italics ours.)*

Likewise, Ralston, in discussing the right of international commissions to pass on their own jurisdiction, states

> "That any other conclusion than the one we have indicated would be erroneous we may believe when we reflect that it is impossible for a mixed commission ever to grant or refuse an award without incidentally or inferentially passing upon its right to reach the conclusion attained, and to deny jurisdiction so to do is in point of fact to deny the right to act at all." (Ralston, International Arbitral Law and Procedure, p. 23).

See also Ralston, International Arbitration from Athens to Locarno, p. 103; Lauterpacht, Private Law Sources and Analogies of International Law, p. 208.

The Commission's power to pass on these questions of its own jurisdiction and the *finality* of its decisions on the point were ably dealt with by Umpire Roberts in his decision of December 15, 1933, in which he stated:

> "A decision that it had jurisdiction of a claim was by the very terms of the Agreement to be accepted by both Governments as final and binding upon them (Article VI). The Agreement submits the questions for decision as between the two Governments to the Commission. What those questions are must be determined within the four corners of the instrument. It is not within the competency of

*John Bassett Moore refers to this statement of Secretary of State Webster as "a position eminently sound in law and wise in practice" (2 Moore, Int. Arb., p. 1241).

either Government to retract the authority which it conferred upon the Commission. If that body may not from the terms of the Agreement ascertain what power was conferred, it would be wholly incompetent to act except in an advisory capacity, and none of its decisions could in the nature of the case be accepted as final and binding by the Governments, as the Agreement states they shall be. How the Commission shall proceed with its task, the form of pleading to be adopted, the manner of hearing (subject to what is hereafter stated in respect of Article VI), the form and entry of its decisions, its control over a case after a decision is rendered, are all left to its determination and regulation.

"The Agreement is to be read in the light of its language and its purpose; and where it is silent, the powers and duties of the Commission are to be determined according to the nature of the function entrusted to it. I have no doubt that the Commission is competent to determine its own jurisdiction by the interpretation of the Agreement creating it. Any other view would lead to the most absurd results—results which obviously the two Governments did not intend." (R. 52-53)

Other international commissions recognize the same principle of finality of jurisdictional decisions.

With reference to a determination of the citizenship of a claimant in the American-Venezuelan arbitration of 1903, the American-Venezuelan Commission stated:

"Hence, the Commission, as the *sole* judge of its jurisdiction must in each case determine for itself the question of such citizenship upon the evidence submitted in that behalf." (*Flutie* cases—Ralston, Report of Venezuelan Arbitration of 1903 (Wash., 1904), pp. 38, 41.) (Italics ours.)

Secretary of State Evarts came to the same conclusion with respect to the powers of the American-Spanish Commission under the Convention of February, 1871. In reference to the validity of judgments of naturalization of certain American claimants, the Secretary of State pointed out that the Commission's decisions on the *"reach of the jurisdiction accorded by the convention of 1871"* were *final* and *conclusive* on both Governments (3 Moore, International Arbitrations, pp. 2599-2600).*

It is clear that the decisions of this Commission, including those relating to its own powers under the Agreement, are not open to attack in a domestic court, and any assertion by either government that the Commission exceeded its powers can be settled, if at all, by negotiations between the two Governments. Ralston, with reference to the decisions of international arbitral tribunals in excess of their powers, states:

> "It is the fact that there is no tribunal capable of determining whether the award of an arbitration is infected with excess of power or essential error, and, save by subsequent agreement, the nations are left to claim as they see fit existence of a wrong of this character. * * *" (Ralston, *International Awards,* 15 Va. L. Rev. 1, 12 (1928))

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*See also *The Betsey,* 4 Moore, International Adjudications (1931), 81, 85, 182, 186; *Hargous* (U. S.) v. *Mexico* (1839), 2 Moore, International Arbitrations, p. 1267; *Rudloff* (U. S.) v. *Venezuela,* Ralston, Report of Venez. Arb., pages 182, 185; Greco-Turkish Agreement of December 1, 1926, Permanent Court of International Justice Advisory Opinion No. 16 (August 18, 1928), Public. Ser. B., No. 16, pages 20, 21; and Castberg, *L'Exces de Pouvoir dans la Justice Internationale* (Academie de Droit International, Recueil des Cours, 1931, I, Tome 25) pp. 425-26.

So far as the negotiations between the two Governments are concerned, the United States has upheld the validity of the awards, and that is the end of the matter so far as petitioners and this Court are concerned.

There are additional reasons why questions of jurisdiction arising before the Commission and decided by it (whether rightly or wrongly) are *res judicata.*

In the field of domestic law the question as to whether the jurisdiction of a judicial tribunal may be collaterally examined has recently been clarified.

In *Stoll* v. *Gottlieb,* 305 U. S. 165 (1938), it was held that where the question of its own jurisdiction over the subject matter was raised before a United States District Court, and the District Court erroneously upheld its own jurisdiction, the determination was *res judicata* between the parties to the action, and the court's judgment was not subject to collateral attack by them. This Court said:

> "A court does not have the power, by judicial fiat, to extend its jurisdiction over matters beyond the scope of the authority granted to it by its creators. There must be admitted, however, a power to interpret the language of the jurisdictional instrument and its application to an issue before the court. Where adversary parties appear, a court must have the power to determine whether or not it has jurisdiction of the person of a litigant, or whether its geographical jurisdiction covers the place of the occurrence under consideration. Every court in rendering a judgment, tacitly, if not expressly, determines its jurisdiction over the parties and the subject matter. An erroneous affirmative conclusion as to the jurisdiction does not in any proper sense enlarge the jurisdiction of the court until

passed upon by the court of last resort, and even then the jurisdiction becomes enlarged only from the necessity of having a judicial determination of the jurisdiction over the subject matter. When an erroneous judgment, whether from the court of first instance or from the court of final resort, is pleaded in another court or another jurisdiction the question is whether the former judgment is *res judicata.* After a federal court has decided the question of the jurisdiction over the parties as a contested issue, the court in which the plea of *res judicata* is made has not the power to inquire again into that jurisdictional fact. We see no reason why a court, in the absence of an allegation of fraud in obtaining the judgment, should examine again the question whether the court making the earlier determination on an actual contest over jurisdiction between the parties, did have jurisdiction of the subject matter of the litigation. In this case the order upon the petition to vacate the confirmation settled the contest over jurisdiction.

Courts to determine the rights of parties are an integral part of our system of government. It is just as important that there should be a place to end as that there should be a place to begin litigation. After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first." (pp. 171-72)

The principle of the *Stoll* case has been reaffirmed in two recent decisions—*Treinies* v. *Sunshine Mining Co.*, 308 U. S. 66 (1939) and *Chicot County Drainage Dis-*

trict v. *Baxter State Bank,* 60 S. Ct. 317 (1940). In the latter case, with respect to the argument that a decree of a Federal District Court, acting as a court of bankruptcy under a statute subsequently declared to be invalid, was open to collateral attack, the Court (by Mr. Chief Justice Hughes) said (p. 319):

> "We think the argument untenable. The lower federal courts are all courts of limited jurisdiction, that is, with only the jurisdiction which Congress has prescribed. But none the less they are courts with authority, when parties are brought before them in accordance with the requirements of due process, to determine whether or not they have jurisdiction to entertain the cause and for this purpose to construe and apply the statute under which they are asked to act. Their determinations of such questions, while open to direct review, may not be assailed collaterally."

See, also, *Sunshine Anthracite Coal Co.* v. *Adkins,* 60 S. Ct. 907 (1940); and 40 Col. L. Rev. 1006 (1940).

Although that principle may not be applicable to an arbitration board created by private contract, it should be applied in this case. The Mixed Claims Commission is an international court, created pursuant to a treaty, under authority of law, and its creation has been ratified by the Settlement of War Claims Act of 1928. It has the characteristics of a court, and there is no reason why the principle of *Stoll* v. *Gottlieb* should not be applied.

Its decisions are *res judicata* as to the United States; they are equally so as to the petitioners, who have no interest beyond that granted to them by the United States.

II.

IF THE QUESTION AS TO THE VALIDITY OF THE AWARDS IS CONSIDERED, THEIR VALIDITY SHOULD BE UPHELD.

In both courts below this respondent urged this point and contended that the Commission had power to reopen the cases, that after the retirement of the German Commissioner the Umpire and American Commissioner had power to proceed, and that the Agency of Canadian Car & Foundry Company, Ltd., a New York corporation, was an American national, within the terms of the Agreement of August 10, 1922. If in this Court the reason assigned for their decisions by the lower courts should be rejected, any other point, urged below and supported by the record, is available to support the judgment. *Helvering* v. *Gowran*, 302 U. S. 238, 245 (1937).

1. The Commission had power to set aside its decision of 1930 and reopen the cases.

This question came before the full Commission in 1933, shortly after the filing of the petition for reopening on the ground of fraud, was the subject of disagreement between the two National Commissioners, and was disposed of by a decision of the Umpire, Mr. Justice Roberts, rendered December 15, 1933 (R. 45-59). At that time Germany contended before the Commission that, even if the decision of 1930 in its favor had been obtained by fraud, the Commission, though still functioning, was helpless to act and without power to reopen the cases. The petitioners now make the same claim.

The fraud charged and proved was not merely occasional perjury of witnesses for Germany. The whole defense from the beginning was corrupt and fraudulent, organized by men who were high German officials of the Foreign Office and General Staff in 1916 and 1917, some of whom were still high officials at the time of the trial. It involved wholesale and organized perjury by groups of witnesses, suppression of documentary evidence, spiriting witnesses out of the country, concealing others, preventing the United States from obtaining testimony of witnesses under the dominion of Germany, forcing witnesses under her dominion to recant, and finally, on a very critical question whether the Kingsland fire was incendiary or an industrial accident, purchasing of perjured testimony from a whole group of former Kingsland employees, the filing of that testimony at the last moment before the hearing in 1930, and the submission by Germany to the payment of blackmail, to keep those witnesses in line,—all this organized and led by representatives of the German Government then in charge of the defense (R. 60, 61 and Mixed Claims Commission, United States and Germany, Opinions and Decisions in the Sabotage Claims Handed Down June 15, 1939 and October 30, 1939 (U. S. Gov't Print. Off., 1940) pp. 21-156, 177, 308-10). No tribunal having regard for the integrity of international arbitrations, having been misled by such means, and by a mistaken assumption that it could rely on complete good faith on the part of a sovereign government, would allow its decision to stand, and the perpetrator of the fraud to escape justice, on the plea that the fraudulent defense had been uncovered too late.

When the petition of May 4, 1933 was filed, the Commission had not disbanded. It was still functioning and had

a number of claims still to be determined (R. 136-37). The decision of 1930 had not been executed. It was not of a nature which required execution. The position of the two governments had not been changed as a result of it.

The principal argument of Germany against the power to reopen rested on the provision of the Agreement of August 10, 1922, that the decisions of the Commission were to be "final and binding upon the two Governments." (R. 55)

That provision has no relation to the Commission's power to reconsider its own decisions. It was meant solely to bar review by any other tribunal and to bind the two Governments to accept the results of their arbitration, and not to bar them from applying for rehearings by the Commission itself.*

The concluding statement in the Umpire's 1933 opinion on this question is:

> "The petition, in short, avers the Commission has been misled by fraud and collusion on the part of witnesses and suppression of evidence on the part of some of them. The Commission is not *functus officio*. It still sits as a court. To it in that capacity are brought charges that it has been de-

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*Counsel for the intervener-petitioner herein, when he was acting as American Commissioner of the General Claims Commission, United States and Mexico, made the same distinction. Although the case before him did not involve the point here in issue, Mr. Nielsen then stated:

> "Motions for rehearing have been presented to and entertained by other international tribunals. Such a motion of course in no way involves the repudiation by a Government of a final decision. * * *" (General Claims Commission, United States and Mexico, Opinions of Commissioners, Oct. 1930-July 1931, p. 207 at p. 232.)

frauded and misled by perjury, collusion, and suppression. No tribunal worthy its name or of any respect may allow its decision to stand if such allegations are well-founded. Every tribunal has inherent power to reopen and to revise a decision induced by fraud. If it may correct its own errors and mistakes, *a fortiori* it may, while it still has jurisdiction of a cause, correct errors into which it has been led by fraud and collusion.

I am of the opinion, therefore, that the Commission has power to reopen these cases, and should do so, in order that it may consider the further evidence tendered by the American Agent and, dependent upon its findings from that evidence and any that may be offered in reply on behalf of Germany, either confirm the decisions heretofore made or alter them as justice and right may demand." (R. 59)

The German Agent in 1932, in response to an explicit question by the Umpire at a hearing on a prior motion for rehearing in these same sabotage cases, agreed that the question as to the power of the Commission to reopen was a justiciable question, for the Commission itself to decide (R. 87-88). (The proceedings at that hearing are set forth fully at pages 13-14 of this brief.)*

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*The German Agent in an earlier brief had similarly stated:

"The question whether and under what conditions a claim passed upon by the Commission may be reopened and reconsidered is one of procedure.

The agreement of August 10, 1922, which provides for the creation of the Commission and defines its powers is silent on the subject. It merely provides that the decision of the Commission shall be accepted as 'final and binding upon the two Governments' (Art. VI, par. 3).

It follows from this provision that neither of the two Governments is entitled to a reopening of a case

After the disagreement arose between the two Commissioners respecting the right of the Commission to reopen for fraud, the contention of Germany that the Commission was without power to reopen was brought to the Secretary of State, who wrote the letter (R. 123) stating:

> "It is the view of the Department that the question whether the Commission has jurisdiction to entertain petitions for rehearing is one properly to be decided by the Commission itself."

After the Umpire's decision of December 15, 1933, settled the question, for six years the Commission proceeded under that decision and both governments actively litigated the claims by submitting voluminous evidence and participating in extensive arguments (R. 95-98; 157-58).

By exchange of notes in May, 1934, the two governments listed the cases still pending before the Commission, and included the sabotage cases in the list (R. 135-37). In the same exchange of notes, the two Governments, at the request of Germany, likewise agreed to consider as pending before the Commission the *Drier* claim, in which a petition for a further award had been filed and with respect to which *Germany* desired an opportunity for further investigation of an award previously granted, with a view to having the award reconsidered by the Commission (*id.*).

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decided by the Commission as a matter of law. *It is left entirely to the Commission whether and under what conditions it may choose to proceed to the reconsideration of a case once decided.*" (Memorandum Brief in Reply to Motion of the American Agent of January 12, 1931 for a Rehearing, pp. 1 and 2.) (Italics ours)

The Commission has repeatedly reopened and corrected its prior decisions in other cases (R. 93-94) and by the decision of June 3, 1936, in these cases, in which the German Commissioner concurred, the Commission set aside its prior decision of December 3, 1932 (R. 138-40).

Petitioner in No. 381 attempts to distinguish this case from other cases in which the Commission reopened and altered its earlier decisions on the ground that in such other cases the Agents of both governments consented to the reopening (Brief in No. 381, p. 65). That distinction does not apply to the decision of June 3, 1936 (R. 138), and does not constitute a valid distinction in any case. The Umpire answered petitioners' argument when Germany so argued in 1933. He pointed out that additional power could be conferred upon the tribunal only by the parties which called it into being, not the Agents or their counsel, and that, therefore, if a case might be reopened by consent of the national Agents, the same action could be taken without their consent (R. 56).

We know of no case—and petitioners have cited none—where it has been held that a commission was without jurisdiction to consider a petition for rehearing properly presented to it while it was continuing to function as a judicial body. The argument that it cannot do so, even to correct fraud, is unconscionable and would both pervert justice and defeat the purpose of the Agreement of August 10, 1922.

The cases relied upon by petitioner (Brief in No. 381, p. 63) do not support the proposition for which they are cited.

Thus the *Cerruti* case (5 Moore, International Arbitrations, p. 4699) involved a submission to Grover Cleveland, as President of the United States, of a claim of Italy against

Colombia. President Cleveland's award was rendered two days before his term of office expired and the "protest" by the Colombian Government—which was *not* a petition for rehearing—was filed with the Secretary of State in the McKinley administration and was rejected.

In the *Claim of Manuel de Cala* (2 Moore, International Arbitrations, p. 1273), the application for review was made, not to the tribunal which had rendered the decision, an international commission, but to a separate domestic commission which had come into existence eight years after the international commission had ceased to function. No application was ever made to the international commission to review its own decision.

Similarly, in the *Claim of Benjamin Weil* (2 Moore, International Arbitrations, p. 1324), the application for a rehearing was denied nine months after the functions of the national commissioners had been officially declared to be at an end. The evidence in support of the application had not been before the national commissioners and had not been examined by them. Malloy, Treaties, Vol. I, pp. 1136-38; Journal of 1868, Mexico Commission, pp. 390-92.

The same commission had earlier recognized its power, while it still sat, to reopen cases by reversing its former ruling in the *Claim of Henry S. Schreck* (Sir Edward Thornton, Umpire).*

Additional instances in which commissions have reopened cases where the provisions respecting the final and binding character of the decisions were at least as strong

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*This appears from the reference to this claim in the case of *Young, Smith & Co.*, 3 Moore, International Arbitrations, pp. 2184, 2186, as well as from the MSS Records of the Department of State.

as they are in the present case can readily be cited. For example, *Bouillotte's* case, French Commission of 1880 (3 Moore, International Arbitrations, pp. 2650-52, MSS Records, Dept. of State); Claim of *F. M. de Acosta y Foster,* Spanish Commission of 1871, where the decision was twice reopened, once with consent and once without consent (3 Moore, Int. Arb., pp. 2187-88, MSS Records, Dept. of State); *C. H. Campbell,* No. 94, and *A. A. Arango v. Spain,* No. 95 Spanish Commission of 1871 (MSS Records, Dept. of State). See also Ralston, *International Awards,* 15 Va. L. Rev. 1, 9 (1928).

That other commissions—like the Mixed Claims Commission—have often refused to grant rehearings in particular cases does not indicate any lack of *power* to grant a rehearing under appropriate circumstances.

2. The retirement of the German Commissioner did not deprive the Umpire and the American Commissioner of power to dispose of the cases.

After twelve years of litigation, the making of a record of over 100,000 pages and oral arguments consuming more than sixty days, and after it had become apparent that the Umpire and American Commissioner were finally and unalterably convinced of Germany's liability, as a final desperate effort to cheat the United States the German Commissioner walked out, protesting vigorously as he went, with the support of his Government, that he took with him all the power of the Commission to proceed (R. 145-52, 153-54, 290 *et seq.,* 195 *et seq.,* 217).

The circumstances of his withdrawal, the state of the case when he withdrew, and the correspondence revealing

his purpose are described on pages 17-23 of this brief. That he withdrew to frustrate and that his act was the act of his Government are conclusively established. No argument to the contrary is made.

The contention of the German Embassy that the withdrawal brought proceedings to a halt was plainly rejected by the Secretary of State (R. 217, quoted at page 29 of this brief).

The Commission, meeting with the two remaining members, in thorough opinions held they had power to proceed and did so (R. 59-62, 154-179).

The authorities are clear that the attempt at frustration was unavailing. *Republic of Colombia* v. *Cauca Company,* 190 U. S. 524 (1903); *Toledo S. S. Co.* v. *Zenith Transp. Co.,* 184 Fed. 391 (C. C. A. 6th, 1911); *Atchison, Topeka & Santa Fe Ry. Co.* v. *Brotherhood,* 26 F. (2d) 413 (C. C. A. 7th, 1928); *American Eagle Fire Ins. Co.* v. *New Jersey Ins. Co.,* 240 N. Y. 398, 148 N. E. 562 (1925); *Grand Rapids Ry. Co.* v. *Jaqua,* 66 Ind. App. 113, 115 N. E. 73 (1917); *State* v. *Tucker,* 39 N. D. 106, 166 N. W. 820 (1918); *Burtlet* v. *Smith,* 94 Eng. Rep. 587 (King's Bench, 1734); *Dalling* v. *Matchett,* 125 Eng. Rep. 1138 (Common Pleas, 1740); Sturges, Commercial Arbitrations and Awards (1930), pp. 427-428, and cases there cited; Morse, Arbitration and Award (1872) pp. 154-58.

The domestic and international law authorities are reviewed in detail in the opinion of the American Commissioner (R. 165-179), which was adopted by the Umpire, June 15, 1939 (R. 60).

In *Matter of Bullard* v. *Grace Co.,* 240 N. Y. 388, 148 N. E. 559 (1925), one arbitrator in a private arbitration had withdrawn before *any* testimony had been taken on the

disputed phase of the case. In permitting that withdrawal to be effective, the Court of Appeals pointed out that the express provisions of the New York statute requiring *all* arbitrators to hear *all* allegations and proofs (New York Civil Practice Act §1453) changed the common law rule to the contrary.

At the same time the New York Court of Appeals, in *American Eagle Fire Ins. Co.* v. *New Jersey Ins. Co.*, 240 N. Y. 398, 148 N. E. 562 (1925), held a withdrawal to be ineffective where the facts were comparable to the instant case. That court stated:

> "If an arbitrator may resign at the last moment, if concert of action in reaching a decision as distinguished from the award itself is necessary, no award could be reached in any case if at the eleventh hour one of the three found himself in the minority and sought to serve his own interests or those of the party naming him by resigning. The law does not contemplate that the edifice thus elaborately raised should be toppled over by such an untimely explosion from within." (240 N. Y. at p. 408)

Petitioner's statements and authorities (Brief in No. 381, p. 44) with reference to the common law arbitration rule refer to the early rule that *agreements to arbitrate* disputes were not specifically enforcible. That has nothing to do with this case. As shown by the English and American cases cited *supra*, the common law denied the power of a party to an arbitration to frustrate the results of the arbitration by well-timed withdrawal of his arbitrator.

The leading case in domestic law on the effect of the withdrawal of an arbitrator under similar circumstances is *Republic of Colombia* v. *Cauca Company*, 190 U. S. 524 (1903).

In the *Cauca* case a controversy between the Republic of Colombia and the Cauca Company, a railway construction company, was submitted to arbitration pursuant to an agreement between the two parties. After extensive hearings, but before consideration of all points had been completed, the commissioner appointed by Colombia withdrew upon the ground that the other members of the commission had declared their intention to grant certain items of damages to the Cauca Company which he considered improper. Thereupon the commissioner appointed by the Cauca Company and the chairman completed their work and rendered a decision in favor of the Cauca Company.

Circuit Judge Goff, before whom the case was tried, characterized the action of the Colombian commissioner in language equally appropriate here. He said:

> "Clearly, it was not the intention of the parties to the convention that the existence of the commission should be destroyed by a resignation of the character of that presented by Commissioner Pena. It would be an impeachment of the common honesty of the parties to the agreement, and a travesty on their evidently honorable intentions, to hold that they designed it should thus be the power of one man—actuated by, to say the least, not commendable motives—to render worthless the work resulting from the expenditure of thousands of dollars and months of careful research, in an effort to amicably adjust an unfortunate controversy, that was rapidly reaching the point of embarrassment because of its national and diplomatic character." (106 Fed. 337, at 348-349)

In the opinion of this Court, it was said that when the resignation took place "hardly anything remained to be done except sign the award" (p. 527) and

> "We are satisfied, further, that whatever might be the technical rule for three arbitrators dealing with a private dispute, neither party could defeat the operation of the submission, after receiving a large amount of property under it, by withdrawing or adopting the withdrawal of its nominee, when the discussions were closed." (p. 528)

Petitioner's statement (No. 331, p. 50) that the *Cauca* commission "adopted the rule that its decisions might be made by a majority vote" misrepresents that case. Although the *Cauca* commission did adopt such a rule, its effect was only to make unanimity unnecessary. At its next meeting it adopted the determination "that in case of disagreement between the members of the commission the chairman shall decide the question at issue," upon which basis the commission proceeded (Sup. Ct. Record, p. 98; see also 106 Fed. 337, at 344). Circuit Judge Goff recognized the effect of this. As he pointed out, the chairman was "intended to be an umpire to cast the deciding vote, and determine all matters of difference between the commissioners selected by the parties to the convention" (106 Fed. 337, at 347). By express provisions of the Executive Agreement here the Umpire had similar authority (R. 16-17).

In some of the other cases above cited holding such attempted frustration ineffective, it appears that the principal issues were under advisement when the withdrawal occurred, but in *Toledo S. S. Co.* v. *Zenith Transp. Co.*, 184 Fed. 391 (C. C. A. 6th, 1911), as here, the arbitrators had not considered the question of damages, but only the question of liability, when an arbitrator withdrew, and the Court held that the remaining arbitrators had power to receive

evidence on and fix the damages. In none of the cases cited (doubtless because an arbitrator is usually not withdrawn until his nominator finds he is to be out-voted) had the withdrawal occurred before questions of liability were under advisement, except the *Bullard* case, and there the court held that the withdrawal was effective because of the New York statute, which changed the common law.

This situation explains the efforts of petitioners to show that the "merits" of the sabotage cases were not under advisement when Germany withdrew. On pages 18-19 of this brief we have stated in detail the questions which were before the Commission when the retirement took place. It has been shown that in substance every question except the amount of damages was up for decision, including the question on the "merits" as to Germany's responsibility for the explosions.

The courts have never fixed any exact stage of arbitration proceedings at which a withdrawal is ineffective. The underlying principle is that it is a fraud to withdraw wilfully after the parties have gone to great expense in producing evidence, and the proceedings are drawing to a close, and a real opportunity has been given the parties to present their cases.

The letter of Secretary of State Hull (page 29 of this brief) follows this line of reasoning.

In this respect this case is well within the principle of the *Cauca* case. Petitioners try to distinguish that case; on the ground that the Cauca board was a "three judge" court, while here we have two commissioners and an umpire. That distinction is without substance. The provision in the Agreement of August 10, 1922, was precisely the same in practical operation as if it had provided for three

arbitrators, one chosen by each government and the third by the two governments "with power to decide by majority vote," except that it did operate to relieve the umpire of the duty of sitting with the two commissioners throughout, if he chose.

On page 16 of this brief, we have referred to the procedure adopted for the sabotage cases, by which the three did sit *en banc* as a "three judge court" to hear arguments. The Umpire participated in all decisions, indeed wrote the opinions, whether or not the other two disagreed. The three members of the Commission sat together at the hearing which led to the decision of 1930, and later the United States questioned that procedure and Germany defended it.* In its unanimous opinion of March 30, 1931 by the then Umpire Boyden, the Commission said:

> "This question is raised by the American Agent's claim that the decision was irregularly rendered because the Umpire participated in the deliberations of the National Commissioners and in the opinion

*In support of the Commission's practice of sitting and deliberating as a three-man body, the German Agent stated in 1931:

> "If it [the Commission] chooses the second method the Umpire loses his character as a 'court of second instance' and becomes a qualified member of a body of three men.
>
> * * * * * *
>
> "From the beginning to the present day the Commission has practically functioned as a single body with the Umpire acting as its third member, casting the deciding vote in the event of disagreement or of differences between the National Commissioners." (Memorandum Brief in Reply to Motion of the American Agent of January 12, 1931, for a Rehearing, pp. 16, 17.)

> of the Commission. The Umpire participated in the deliberations of the Commissioners and in the opinion in accordance with the usual practice of the Commission in cases of importance since its foundation in 1922, *a practice never before questioned and not in our judgment of doubtful validity even if it had not so long been accepted by all concerned.*"* (R. 85) [Italics ours]

The provision in the Agreement of August 10, 1922, providing the method of filling vacancies, is a common one in arbitration agreements. A similar practice was provided for in the *Cauca* case (Sup. Ct. Record, p. 61). It does not by inference exclude the Commission from acting after one Commissioner has been purposely withdrawn. It is intended merely to afford each party an opportunity to fill ordinary vacancies.

John Bassett Moore, when commenting on the question of the right of withdrawal in connection with the arbitration which took place under the Jay Treaty of 1794, and commenting on the provision for filling vacancies, said:

> "* * * On the other hand, it can hardly be supposed that the governments, in agreeing to Articles VI and VII, had it in mind to create a device by which either of them, or the commissioner named by either of them, might by withdrawing, readily prevent the majority of a duly constituted board from exercising its constitutional powers.
> * * * * * * *

*Petitioner in No. 382, in addition to attacking other decisions of the Commission, now also alleges that the above-quoted unanimous decision in favor of Germany of March 30, 1931 was wrong (Brief in No. 382, p. 13).

> As the claim of a right to withdraw cannot reasonably be adduced from the terms of the treaty, so likewise is it unjustified under international law. Its justification in the present instances, whether at London or at Philadelphia, must, therefore, be sought in moral rather than in legal considerations." (3 Moore, International Adjudications, Modern Series, p. 170.)

As Secretary of State Evarts stated with reference to the refusal of the Spanish arbitrator to join the American arbitrator in referring cases to the Umpire for decision in the American-Spanish Commission of 1871, it is "beyond the competence of either government to interfere with, direct or obstruct its deliberations." (3 Moore, Int. Arb., p. 2599 and MSS Notes of the United States to the Spanish Legation)

See also other international law authorities reviewed in the opinion of the American Commissioner (R. 174-76).

Petitioner's reference to action by the Mixed Arbitral Tribunals of Hungary and Roumania (Brief in No. 381, pp. 46-47) should be considered in the light of the strong opinion expressed by an eminent authority as to the ineffectiveness of the attempted frustration in that case (*Some Opinions Bearing Upon the Treaty of Trianon*, Vol. II, Fachiri, pp. 229, 239-240, 242).

There is another clear ground for holding that Germany could not frustrate the arbitration by withdrawing her Commissioner.

(i) The Knox-Porter Resolution, approved July 2, 1921 (42 Stat. 105-6) provided that all property of Germany and its nationals in the possession of the United States

should not be returned until such time as Germany had made "suitable provision" for satisfaction of claims of American nationals.

(ii) The substance of the resolution was embodied in the Treaty of Berlin of August 25, 1921 (42 Stat. 1939).

(iii) The Executive Agreement of August 10, 1922 (42 Stat. 2200) establishing the Mixed Claims Commission, was an essential part of the "suitable provision" referred to in the Treaty of Berlin.

(iv) The Settlement of War Claims Act of 1928 (45 Stat. 254), which provided for the return to Germany of seized property, *was enacted in reliance upon the fact that the Commission had been established and on assurances from Germany that she would not impede or obstruct the Commission in the disposal of these very sabotage cases.*

(v) Since its passage, in reliance on the continued functioning of the Commission, more than $175,000,000 of German property has been returned (Final Report of the Alien Property Custodian, February 5, 1935, House Document 135, 74th Cong. 1st Sess. and Report of the Secretary of the Treasury for fiscal year ended June 30, 1939, p. 76).

The Hearings before the Senate Finance Committee, 70th Congress, H. R. 7201, January 23-26, 1928, pp. 134-9, 191-5, disclose that a representative of this same respondent Lehigh Valley Railroad Company (with remarkable foresight as events have proved) appeared and objected to the return of German property until the Mixed Claims Commission had decided the sabotage cases. He feared that, if German property was first returned, Germany would by some device disrupt the Commission and prevent the granting of sabotage awards.

The record of the Committee Hearings contains the following:

"Senator Reed. The Mixed Claims Commission does not deny that it has jurisdiction, does it?

Mr. Boles. Oh, no; it does not deny that it has jurisdiction, but the Mixed Claims Commission has not the power to force the German Government to try this case. *What will undoubtedly happen, and it is our confident belief in view of the way that we have been diplomatically maneuvered along the last three years, is that the Mixed Claims Commission will disintegrate, perhaps.* There will be deaths *and resignations;* witnesses will die, and the thing will go on for 5 or 10 more years, and we will finally be relegated to a case before Congress.

Senator Reed. I do not understand why you can not go ahead and prove your case, and if the German Government does not care to put in any defense, all the better for you.

Mr. Boles. The Mixed Claims Commission has no power to make an award by default. They have no power to do that. There must be a trial of the merits.

The Chairman. If that were the case, the Mixed Claims Commission never could have settled a case if the German representatives refused to talk.

Mr. Boles. That is the case.

Senator Edge. As I understand it, Mr. Boles, the difference in your case and the many cases that the Mixed Claims Commission have adjudicated and decided is that your case relates to the acts of the German Government that have never been reviewed by the Mixed Claims Commission in any case?

Mr. Boles. That is true.

Senator Edge. And that no case in which sabotage is involved has yet been tried by the Mixed Claims Commission?

Mr. Boles. *That is true; and by the very nature of these cases, they will delay them indefinitely if they can.*

Senator Edge. *And, further than that, if the German representatives will not agree to try the case, the commission is helpless?*

Mr. Boles. *Exactly so.*

* * * * * * * * *

Senator Reed. What provision do you propose that we should insert in the bill to meet this situation?

Mr. Boles. The provision that the present German property shall be retained until the Mixed Claims Commission has disposed of the cases now pending before it." (Italics ours)

Impressed by this argument, the Senate Committee called in Judge Parker, then Umpire of the Commission, and questioned him as to what the Commission could do, if Germany should decline to appear before a decision could be rendered in the sabotage claims. Judge Parker stated that the Commission could proceed to decide the cases even if Germany went so far as to refuse to appear or submit any testimony.

"Senator McLean. You have jurisdiction?

Mr. Parker. Yes; we have jurisdiction in any event. But if Germany in any case should arbitrarily decline to file an answer to the American memorial or submit testimony within the period prescribed by these rules, the commission would consider that case on its merits, not by default, but on the merits of the case made by the American agent.

Senator McLean. If they deliberately declined to appear and make any presentation, would you feel justified in rendering judgment in the case?

Mr. Parker. Unquestionably we would take the case as presented by the American Agent and decide

it according to the record made by the American agent." (*Id.*, Hearing, pp. 192, 193) (R. 83-84)

Furthermore, Judge Parker presented to the Committee a letter written to him by the Agent of the German Government, giving assurance that Germany would do nothing to impede the disposition of the sabotage claims.

"Mr. Parker. * * *

May I read this, then? It is addressed to me by Karl von Lewinski, agent of Germany:

'I understand that a witness who appeared before the Senate Finance Committee to-day made the statement that he believed there was a disposition and purpose on the part of the German agent and the German Government to delay the presentation of a certain case before the Mixed Claims Commission, and that it was within the power of the German agent and the German Government to so delay the early adjudication of the case. As to the last assertion, I am confident you will agree with me that the witness in question was mistaken and that under its rules the commission may and does compel the presentation of briefs and arguments and the preparation of cases for final submission to the commission within a reasonable time. *As to the statement that there is any thought or purpose on the part of the German agent or the German Government to delay the presentation and adjudication of this or any other case, I desire to enter a most emphatic denial.*

* * * * * * * *

I have the honor to be, sir,

Your obedient servant,

KARL VON LEWINSKI, Agent of Germany."

(Italics ours)

Satisfied by these representations, the bill was favorably reported and passed, without the Boles Amendment.*

Under those circumstances, having entered into the arbitration as a condition to the return of German property and having received benefits under the Settlement of War Claims Act, Germany could not frustrate proceedings before the Commission *at any stage.*

In the *Cauca* case this Court said (p. 528):

> "Colombia thus is put in the position of seeking to defeat the award after it has received the railroad in controversy and while it is undisputed that an appreciable part of the consideration awarded ought to be paid to the company under the terms of the submission.
>
> * * *
>
> We are satisfied, further, that whatever might be the technical rule for three arbitrators dealing with a private dispute, neither party could defeat the operation of the submission, *after receiving a large amount of property under it,* by withdrawing or adopting the withdrawal of its nominee when the discussions were closed." (Italics ours)

Finally, if there were any doubt as to the failure of Germany's attempted frustration, this Court's accepted principle of treaty construction would resolve it. As Mr. Justice Stone has stated:

> "In choosing between conflicting interpretations of a treaty obligation, a narrow and restricted con-

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*With the above indication of Congressional intent in enacting the Settlement of War Claims Act of 1928, compare the unwarranted statement in petitioner's brief (No. 381, p. 73) that "Congress never intended to appropriate funds to the payment of any alleged awards under the circumstances here disclosed."

struction is to be avoided as not consonant with the principles deemed controlling in the interpretation of international agreements. Considerations which should govern the diplomatic relations between nations, and the good faith of treaties, as well, require that their obligations should be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them. For that reason if a treaty fairly admits of two constructions, one restricting the rights which may be claimed under it, and the other enlarging it, the more liberal construction is to be preferred." (*Factor* v. *Laubenheimer*, 290 U. S. 276, at 293-94 (1933))

See also *Asakura* v. *Seattle*, 265 U. S. 332, 342 (1924); *Geofroy v. Riggs*, 133 U. S. 258, 271-72 (1890); and 30 Col. L. Rev. 521, at 523 *et seq.* (1930).

By the Executive Agreement of August 10, 1922 Germany "resolved to submit" and did submit all "questions for decision" to the Mixed Claims Commission. That submission was "final and binding" and could not be withdrawn at will. Until such questions were finally decided, Germany possessed no power to veto, or by any device to withdraw from the consideration of the Commission, permanently or indefinitely, any questions involved in the determination of the American claims.

3. Agency of Canadian Car & Foundry Company is an American national within the meaning of the Executive Agreement of August 10, 1922.

That concern is a New York corporation. Its offices always have been in New York City. Practically all its

business was done in the United States. Its plant, which was destroyed, was located at Kingsland, New Jersey, where it employed two thousand men (R. 185). The petitioners assail the award to the United States on behalf of that claimant as void and beyond the power of the Commission on the theory that the corporation was not an American national within the meaning of the agreement establishing the Commission. All of the stock of the New York corporation was owned by a Canadian corporation, and a portion of the Canadian corporation's stock was held by citizens of the United States, the number of shares varying from time to time between 30% and 45% (R. 185-86).

The question whether its losses were the proper subject of an award involved questions of fact and also interpretation of the Executive Agreement and came before the Commission for decision in the regular course of its duties. In every claim the Commission was required to determine the nationality of the claimant.

The argument that the Commission did not have power to decide questions of fact and law respecting nationality by decisions "binding on the two governments" would result in leaving the question of nationality to be settled in every case by separate diplomatic agreement.

The full facts affecting nationality were disclosed to the State Department and to Germany many years ago (R. 185-86). The State Department espoused the claim (R. 186). Not until December 7, 1936, nine years after the United States had filed the claim with the Commission, and after thousands of pages of evidence had been taken respecting its merits, did Germany, in a half-hearted way, raise the question of nationality (R. 183). On December 7, 1936 (after the first argument on the fraud petition for

rehearing), Germany filed a motion raising the point; on March 18, 1937, the German Agent withdrew his motion; on April 27, 1937, he renewed it (R. 183). After both Agents had filed briefs on the point, the Commission denied the motion (R. 195).*

The propriety of the award is so amply supported by the authorities cited and discussed in the opinion of the American Commissioner of October 30, 1939 (R. 182-94), which was concurred in by the Umpire (R. 195), that no useful purpose would be served by reviewing those authorities here, or discussing the provisions of the Agreement of August 10, 1922 as to the character of the claims to be considered.

Petitioners' brief merely recites the same cases cited before the Commission and discarded by the Umpire and the American Commissioner as inapplicable to the situation presented by the claim.

III.

MISCELLANEOUS CONTENTIONS OF PETITIONERS

1. Certificate of disagreement

The petitioners stress the fact that no written certificate of disagreement between the National Commissioners preceded the decisions of June 15 and October 30, 1939.

*Although petitioner in No. 382 does not argue the nationality question, it is interesting to note that counsel for that petitioner, in his Report of May 15, 1937, as Commissioner in the settlement of the American-Turkish claims under the Agreement of December 24, 1923, stated

> "The nationality of a corporation is that of the state under whose laws the corporation is organized." (American-Turkish Claims Settlement, Opinions and Report, p. 119)

The Agreement of August 10, 1922, did not require such certificates. They were provided for by a rule of the Commission as a convenient and formal procedure. Years ago the Commission held they were unnecessary in cases where the Umpire sat with the Commissioners and became aware of a difference of opinion (R. 51-52).

The petitioners also contend there was no disagreement in fact before the German Commissioner resigned. The Umpire and American Commissioner stated of record there was (R. 59-60, 159). The letter of the German Commissioner complaining of the Umpire (R. 145-47) states that he retired because the Umpire was so fixed in his opinions that he would not listen to the German's arguments, a naive confession that the German Commissioner had and urged fixed opinions of his own.

In passing it may be noted that, if any member of the Commission had no convictions after days of argument, reams of briefs and days of conferences, he would have been an extraordinarily weak person.

This is all immaterial. The essential point is that, if the German Commissioner's absence and consequent non-participation in decisions could not frustrate the proceedings, the mere formal consequences of his absence, rendering him unavailable to "disagree" or sign certificates, could not frustrate. The greater includes the less.

2. Complaints of unfairness and lack of notice in fixing damages

That subject is fully covered in the statements of facts, pages 17-32 of this brief, on which we rest.

3. Complaints against the Commission because of the finding made June 15, 1939, on the "merits" which it is claimed were not under submission

Here also the statement of facts, pages 17-27 of this brief, is sufficient answer.

4. The claim that there were genuine issues as to material questions of fact, which made it improper to grant summary judgment

The short answer to this is that petitioner, Z. & F. Assets Realization Corporation, which now argues the point in its brief, did not mention it or make it the subject of an assignment of error in its petition for *certiorari,* and counsel for the other petitioner, although he mentioned the point in his petition for *certiorari,* did not include it in his assignments of error in his supporting brief on petition for *certiorari* and does not urge the point in his brief here, by assignment of error or otherwise.

The statement by petitioner in No. 381 of alleged genuine issues of fact (pp. 80-82 of its brief) shows how flimsy the point is.

Rule 56(c) of the Federal Rules of Civil Procedure provides that, on motion for summary judgment, the judgment sought "shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

The alleged issues of fact claimed by petitioner to require denial of the motion are stated to be (Brief in 381, pp. 80-82):

> "*First:* If the time of the issuance of the certificate is at all relevant, there is an issue of fact as to whether the Certificates of the Secretary of State certifying to the awards were transmitted to the Secretary of the Treasury, with knowledge that this action had been commenced.
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> * * * * * * * *
>
> "*Second:* Whether the Commission, with Germany's consent, had under consideration the merits of the sabotage claims.
>
> * * * * * * * *
>
> "*Third:* There is at least an issue of fact whether there was a disagreement between the two national Commissioners authorizing the Umpire to function."

Its first "issue", whether or not the Secretary of State certified the awards with knowledge that the complaint in the District Court had been filed, is of no consequence and could only become so if the Court should decide that the question of validity of the awards is justiciable and that the awards are invalid, and the question then arose whether it was too late to grant relief. All the reasons we advance to the effect that the Courts have no power to interfere with foreign relations and that the awards are valid would apply as well, if the certificates had not yet been made.

Their second "issue", that there is an issue of fact as to whether the Commission had under consideration the

"merits", is irrelevant if the Court sustains our position that it cannot inquire into the validity of the awards.

If it does inquire into their validity, the question of what was up for decision when Germany withdrew is not material *unless* the Court should hold that the withdrawal prevented the Commission from deciding *any* further question. In addition, the proof of what was before the Commission is contained in the records of the Commission, including the official opinions of the Umpire and American Commissioner,—unless, perhaps, the petitioners hope to impeach them by the testimony of the Ex-German Commissioner. In respect of that, Rule 56(e) requires that affidavits on motions for summary judgment must be "on personal knowledge", and the petitioners present no affidavit from any one assuming to have personal knowledge.

As to the third "issue", *viz.*, whether there was a disagreement in fact between the Commissioners, the situation is precisely the same.

Under the circumstances, a trial would serve no purpose other than to delay a determination of the questions presented. *Eastern States Petroleum Co., Inc.* v. *Asiatic Petroleum Corporation, et al.*, 28 F. Supp. 279 (S. D. N. Y., 1939); *Banco de Espana* v. *Federal Reserve Bank of New York*, 28 F. Supp. 958 (S. D. N. Y., 1939), aff'd 114 F. (2d) 438 (C. C. A. 2d, 1940). The following comment of the Court in the *Banco de Espana* case is apt (p. 975):

> "It appears to me that these cases should be disposed of on these motions and not at a trial. No genuine issues of any material facts are presented. The entire transaction is before the Court, evidenced mainly by duly authenticated or undisputed documents. The Rule for summary judgment was intended for just such a situation."

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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